No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, JOHN E. FOLEY, and JOSEPH M. MISBRENER,

Petitioners,

v.

SINCLAIR OIL CORPORATION, a Wyoming and Delaware corporation, EARL HOLDING, individually and as Director and Officer of Sinclair Oil Corporation, J.R. McINTIRE individually and as Refinery Manager and employee of Sinclair Oil Corporation, and JOHN DOE(S), whether singular or plural, that individual or those individuals who participated in the republishing of the defamatory statement,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WYOMING SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's holding in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) compels the conclusion that, for purposes of application of the malice standard and pre-trial proof purposes, labor dispute participants should be treated as public figures or the matter analyzed as though a communications media defendant is involved.

2. Whether the Wyoming Supreme Court properly utilized the malice standard concerning Petitioners Misbrener and Foley who were non-active participants to the Wyoming labor dispute and who were defamed by statements prepared by a third party, re-published by a party to the labor dispute, which statements are unrelated to the dispute at issue.

3. Whether the Wyoming Supreme Court, in any event, properly applied this Court's pronouncements to the application of the malice standard as such standard has been defined concerning communications media defendants, public figures, and matters of public concern, particularly in light of a re-publication of a defamatory letter by one of the labor dispute participants.

4. Was it proper for the lower courts to affirm the application of the attorney-client privilege in a case where this Court has not yet defined minimum malice standards to be applied, in a way which deprived Petitioners' access to the most critical evidence concerning malice, thereby denying Petitioners' constitutional right to access to courts.

5. Whether the Wyoming Supreme Court misapplied this Court's reasoning in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) in determining that most of the defamatory letter constituted protected opinion.

PARTIES TO THE PROCEEDING

Since the caption of the case in this Court contains the names of all the parties, a list of parties is not necessary pursuant to Rule 21.1(b) of this Court.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WYOMING SUPREME COURT

The Oil, Chemical and Atomic Workers International Union, John E. Foley, and Joseph M. Misbrener petition for a writ of certiorari to review the judgment of the Wyoming Supreme Court in this case.

OPINION BELOW

The official reports of the opinion delivered by the Supreme Court of the State of Wyoming, and complete caption of the case, are as follows:

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, JOHN E. FOLEY, and JOSEPH M. MISBRENER, Appellants (Plaintiffs) v. SINCLAIR OIL CORPORATION, a Wyoming and Delaware corporation, EARL HOLDING, individually and as Director and Officer of Sinclair Oil Corporation, J.R. McINTIRE individually and as Refinery Manager and employee of Sinclair Oil Corporation, and JOHN DOE(S), whether singular or plural, that individual or those individuals who participated in the republishing of the defamatory statement, Appellees, (Defendants), 748 P.2d 283 (Wyo. 1987).

JURISDICTION

The judgment or decree sought to be reviewed was dated December 22, 1987, and the time of its entry was unknown. The date of the order denying Petitioners' request for a rehearing was January 14, 1988. An order granting Petitioners until May 20, 1988 to file their Petition for Writ of Certiorari was entered by this Court on April 4, 1988. The statutory provision conferring on this Court jurisdiction to review a judgment in question by writ of certiorari is 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION

Constitution of the United States of America, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

On April 25, 1984, after over fifty years of representing employees at Respondent Sinclair Oil Corporation's Refinery in Sinclair, Wyoming, the Local Union No. 2-269 of the Petitioner Oil, Chemical and Atomic Workers International Union ("OCAW") was decertified as a result of a decertification election.[1] Although the election, itself, was rather routine, the events leading up to the decertification election are anything but routine. Events spanning as far back as 1972 affected the decertification election and eventually give rise to the within Petition for Writ of Certiorari.

Prior to the decertification, the OCAW and Sinclair were engaged in tough collective bargaining negotiations. To aid in these negotiations, the OCAW was considering other strategies to aid in the negotiation process. In connection with the strategies, investigations of the public record were undertaken concerning the owner of Sinclair, Respondent Holding.

Dorothy Palacios, an International Representative with the OCAW International Union, first employed in 1972, was directed to research and investigate public records concerning Holding and his connections with Southern California in areas where, *inter alia*, economic pressure in aid of resolving issues in negotiation could be brought by the Union. Ms. Palacios was assigned to the geographic area which included Southern California. Petitioner John E. Foley was, and remains, the District Director over the geographic area which includes the state of California. Director Foley was Ms. Palacios immediate supervisor. The assignment given to Ms. Palacios was to search for information concerning Holding, or Sinclair, which might be of

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[1]For a number of years, Sinclair was a privately and closely held "family" corporation, and Respondent Robert Earl Holding ("Holding") its principal stockholder.

assistance with respect to the contract negotiations then in progress in Sinclair, Wyoming.

According to Ms. Palacios' testimony, she traveled to San Diego, California to research public files in government offices for information regarding Holding. She also traveled to the Westgate Hotel in San Diego, a hotel she had learned was owned by Holding or some entity in which Holding was the primary shareholder. As a result of Palacios' efforts, she prepared a report dated February 27, 1983, which was submitted to Petitioner Joseph Misbrener, then Vice-President of the OCAW and now International President of the OCAW.

Relations between Ms. Palacios and the OCAW were often strained both before and during the periods described above. Eventually, in September of 1983, Ms. Palacios was terminated by the OCAW for, primarily, insubordination. Prior to her termination, Ms. Palacios filed a grievance through the steward of the union representing International Representatives, the International Representatives Committee Union. This grievance alleged, among other things, harassment on the part of the OCAW.

Following her September, 1983, termination, Ms. Palacios filed another grievance through her union alleging that her discharge was without cause. She also filed an unfair labor practice charge with the National Labor Relations Board and a discrimination charge with the Equal Employment Opportunity Commission. Eventually, matters related to Ms. Palacios' grievances and charges were settled by mutual agreement of the parties.

Shortly after Ms. Palacios' termination by the OCAW, she contacted Holding. Palacios inquired if Holding would consider speaking with his attorneys concerning representing her in connection with her then-pending grievances and charges against the OCAW. Ms. Palacios followed her conversation with a letter dated January 10, 1984, wherein she thanked Holding and again asked him for assistance in finding counsel stating:

> It is, though, with the thought that you, too, should benefit and

> that perhaps aspects of the case [her employee grievances against the OCAW] will surface which may be of help to you in your association with that organization [OCAW] and I would have it understood with the attorney that any material that arose would be available to you and not submerged by the usually fiduciary attorney/client relationship.

Soon after her January 10, 1984 letter, Ms. Palacios received a telephone call from Mr. Daniel Gruender, Esq., an attorney whose firm represented Sinclair Oil Corporation, Holding, and several other of Respondent Holding's entities. Mr. Gruender had been intimately involved in the negotiations in Wyoming. Aware that Mr. Gruender's firm, Schimmel, Hill, Bishop and Gruender, represented Holding and his entities, Ms. Palacios entered into an agreement with Mr. Gruender for his representation of her against the OCAW in connection with her employment matter.

Daniel Gruender informed Ms. Palacios of the decertification election to be held in Sinclair, Wyoming. Even though the decertification matter had no direct connection or relevance to the matters surrounding Gruender's representation of her, Palacios chose to offer a letter addressed to the "OCAW - Represented Employees of the Sinclair Refinery" in early April of 1984.[2] The letter is reprinted in full in the opinion of the Wyoming Supreme Court, at pages A-4 to A-7 of the Appendix hereto. This letter, which is the subject matter of the litigation giving rise to the within Petition, was prepared, according to Ms. Palacios' testimony, of her own volition without anyone's suggestion.

Ms. Palacios mailed the letter to Gruender telling him he could use it if it would be helpful to the cause of Mr. Holding in Sinclair, Wyoming. Prior to mailing her defamatory letter, Ms. Palacios provided Daniel Gruender with a copy of the report she prepared for

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[2]Although Ms. Palacios' motives were obviously vengeful by this letter, full development by Petitioners of the record concerning her and Gruender's motives in connection with this letter has been denied by Petitioners on the basis of the attorney-client privilege, as discussed below.

the OCAW concerning her investigation of Holding, as well as a copy of the telegram from the OCAW requesting that she perform the assignment. All of these actions were in accordance with her January 10, 1984 letter, discussed above.

Ms. Palacios' letter to the employees, which indicates that *"[t]here are some facts you [the employees at Sinclair Oil] should know,"* (emphasis in the original) proceeded to make false representations concerning several matters involving the OCAW, Petitioner Misbrener and Petitioner Foley. The letter first accuses the OCAW of flagrantly violating Ms. Palacios' rights as "a union member; as a professional employee of OCAW; ...and as a USA citizen...," although no facts supporting these allegations are presented in the letter. App. at A-5. Ms. Palacios' alleges thereafter that she was terminated as a result of her filing discrimination and harassment charges against the OCAW. Significantly nowhere does Palacios set forth the contents of the letter of termination she received.

Ms. Palacios' letter also discusses, in false and defamatory terms, matters surrounding Ms. Palacios being requested to investigate Mr. Holding. Throughout the remainder of the letter, Ms. Palacios states that the OCAW and officers are trashy and unethical and undertook an action to "undeservedly malign" Holding. App. at A-6. Palacios' asserts that the leadership of the OCAW abdicated any sense of decency for selfish political reasons. Ms. Palacios concludes that the OCAW leadership consists of dirt-seekers and is foul stating: "[h]onest union leaders do not need to 'dig dirt' nor [sic] stoop to the foul play to which I've been exposed in the last years of my employment." App. at A-7.

Daniel Gruender delivered the defamatory Palacios' letter to Sinclair personnel at the Sinclair Refinery. According to several deponents' testimony, including Respondents Holding and McIntire, Mr. Gruender took part in all discussions held in the days immediately prior to the decertification election concerning the strategic decision of whether to republish the letter to the employees. Mr. Gruender also traveled to the *Rawlins Daily Times*, the local newspaper, with the letter, in an attempt to have the letter published.

Notwithstanding the fact that Palacios was a recently terminated and disgruntled employee with every reason to make defamatory statements about her former employer, and notwithstanding the fact that Respondents Holding, McIntire and Sinclair had no reason to have any knowledge concerning the treatment of the OCAW of its former employee or other matters in the letter, other than their own bias concerning the OCAW, Sinclair re-published, to the Refinery employees, the Palacios' defamatory letter immediately before the election, attached to a cover letter signed by Respondent Rodney J. McIntire, then a refinery manager and employee of Sinclair Oil Corporation. As a result of the election, the OCAW was decertified.

On February 22, 1985, the Petitioners filed a Complaint in the District Court, Second Judicial District in Rawlins, Wyoming. The Complaint stated causes of action against the Respondents due to the republication of the defamatory letter as well as a cause of action for civil conspiracy on the part of, among others, the Respondents in republishing the defamatory letter.

The Respondents began a frantic discovery pace including the taking of many depositions. During many depositions taken by the Petitioners, objections based upon the attorney-client privilege to any and all questions concerning the decision to republish the letter were interposed. Key evidence surrounding the state of mind of the republishers, was withheld by the Respondents. The trial court sustained the attorney-client privilege objection, which decision was affirmed by the Wyoming Supreme Court.

Although the action by the OCAW against the Respondents involves a labor dispute, the claims brought by the individual Petitioners against the Respondents due to the republishing of the defamatory statement does not since statements concerning Petitioners Misbrener and Foley concern matters, at best, tangentially related to the decertification election.

II. HOW THE FEDERAL QUESTION WAS PRESENTED.

The federal question surrounding the lower courts' improper

interpretation and application of the malice standard required by this Court to be applied in a labor dispute defamation context pursuant to *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) was first presented to the trial court below by way of the Respondents' Motion to Dismiss or in the Alternative for Summary Judgment as well as the Petitioners' documents filed in response thereto. The trial court's Findings of Fact and Conclusions of Law and Judgment, and attachment, included in the Appendix to this Petition at pages B-1 through C-19, dealt extensively with the federal question of the issue of the appropriate malice standard to be applied pursuant to this Court's directives. Also, the Wyoming Supreme Court was presented with arguments by all parties concerning the application of the malice standard in a labor dispute context. The state supreme court specifically ruled, in interpreting decisions of this Court, concerning the malice standard and its definition and application to a labor dispute defamation action. The opinion of the Wyoming Supreme Court is included in the Appendix at pages A-1 through A-24.

With respect to the Petitioners' urging that their consitutional rights guaranteed by the Fourteenth Amendment of the United States Constitution have been stripped by rulings of the lower courts concerning the attorney-client privilege issue, such position was presented to the trial court in the first instance in a Motion to Compel Discovery filed by the Petitioners and dealt with in the trial court's Order concerning Plaintiff's Motion to Compel and Supplemental Motion to Compel, attached hereto in the Appendix at pages D-1 through D-15. The trial court erroneously upheld the use of the attorney-client privilege by the Respondents to unconstitutionally block the Petitioners' rights to discovery and access to courts. The matter was, as well, presented to the Wyoming Supreme Court by way of the briefs filed by the parties below and that court ruled in its decision attached hereto on the federal question.

Both the trial court and Wyoming Supreme Court were presented with arguments surrounding their erroneous application of the theory of protected opinion pronounced by this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and, as their opinions demonstrate, the issue was ruled upon by both lower courts.

REASONS FOR ALLOWANCE OF THE WRIT

I. THIS COURT'S HOLDING IN *LINN v. UNITED PLANT GUARD WORKERS*, 383 U.S. 53 (1966) DOES NOT COMPEL THE CONCLUSION THAT LABOR DISPUTE PARTICIPANTS SHOULD BE TREATED AS PUBLIC FIGURES OR THE MATTER ANALYZED AS THOUGH A COMMUNICATIONS MEDIA DEFENDANT IS INVOLVED FOR APPLICATION OF A MALICE STANDARD AND FOR PRETRIAL PROOF PURPOSES, PARTICULARLY GIVEN A RE-PUBLICATION BY ONE OF THE LABOR DISPUTE PARTICIPANTS OF DEFAMATORY MATERIAL.

This Court in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) had before it a question involving the extent to which the National Labor Relations Act superceded state law with respect to libels published during labor disputes. This Court held that, in order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy, participants to a labor dispute may avail themselves of state remedies for libel only in those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage. *Ibid.* at 64-65.

This Court made clear, however, that the malice standard being utilized, as annunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) was "adopted by analogy, rather than under constitutional compulsion...to effectuate the statutory design with respect to preemption." *Linn* at 65. The majority opinion concluded by reiterating that the Court was dealing "not with a constitutional issue but solely with the degree to which state remedies have been pre-empted by the [National Labor Relations] Act." *Id.* at 67.

The Wyoming Supreme Court, however, and numerous other state and federal courts, have utilized the strictest standards concerning the malice test in connection with labor dispute defamation actions. *See*, App. at A-10, and cases cited by the Wyoming Supreme Court

therein. Application to participants in a labor dispute of the strict tests utilized in instances involving public figures and when communications media defendants are involved is inconsistent with the holding of *Linn* and, particularly in light of the facts developed in the within action, results in a grave injustice to similarly situated parties.

The crux of the issue requested to be heard by this Court by the within Petition surrounds the definition of publishing a matter with "reckless disregard as to the truth of the matter." The definition of reckless disregard utilized by the Wyoming Supreme Court is that definition which has been adopted by that court, and others, in cases involving communications media defendants and public figures. Reckless disregard, according to the Wyoming Supreme Court, involves sufficient direct evidence, giving little weight to inferences, to permit the conclusion that the defendant must have, in fact, subjectively entertained serious doubts as to the truth of the statements published. *McMurry v. Howard Publications Inc.*, 612 P.2d 14, 18 (Wyo. 1980).

The circumstances surrounding the defamatory re-publication in the within case demonstrate that the Wyoming Supreme Court, and other courts utilizing such a standard, are not applying the proper test, a test which this Court has not yet specifically defined. Applying a standard such as that utilized by the Wyoming Supreme Court, to the type of labor dispute action presented herein, is unconscionable for several reasons. First, such a test ignores the relationship of the parties to the labor dispute which is not present in communications media defendants/public figure cases. Little doubt exists but that, as is often the case in labor disputes, feelings of hostility existed between the union—OCAW—and the employer—Earl Holding, the principal officer of Respondent Sinclair. Thus, when, as in this case, a statement prepared by a third party, a disgruntled employee, is received by one of the parties to the labor dispute, concerning the other labor dispute participant, which statement contains information beyond the scope of the labor dispute but which, in any event, is defamatory in character, the recipient is likely to readily accept such defamatory falsehoods as true.

Those statements in Palacios' letter in the first paragraph dealing with her employment relationship with the OCAW, as well as other statements throughout the letter concerning her 12 years of employment with OCAW, had no relation to the labor dispute at hand. Deposition testimony disclosed that neither Holding nor anyone else associated with the re-publication of the letter had any specific knowledge concerning Ms. Palacios' treatment as an employee by OCAW, yet they believed the false statements were true based upon their prejudicial beliefs about the Union and how it "must treat," in their eyes, its employees.[3]

Requiring the plaintiff in a labor dispute defamation case to demonstrate that a publisher acted with actual awareness of the probable falsity of the statement or that the publisher in fact entertained serious doubts, when the defamatory statement likely reaffirms the prejudicial beliefs of the publisher, would effectively act as an unconstitutional bar to lawsuits by parties to a labor dispute except in the rarest of circumstances. The subjective awareness test utilized by the Wyoming Supreme Court gives unbridled license to the recipient of defamatory statements prepared by a third party to publish those statements without fear of being held accountable for the damage done to the reputation of the defamed.

A second factor which requires that the "subjective awareness" standard utilized by the Wyoming Supreme Court not be utilized in the labor dispute context surrounds the goals in publication. Typically in the labor dispute context the parties are vying for what they consider critical advantages and goals. Conversely, communications media defendants typically have as their goal the dissemination of information to the public. The same standard should not be utilized in both instances since, *inter alia*, the incentive to act recklessly to the detriment of the defamed is too great in the labor dispute situation.

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[3]Attorney Daniel Gruender, who participated in the decision of whether to republish the letter, certainly may have had information concerning Ms. Palacios' treatment as an employee. However, as will be discussed further below, the imposition of the attorney-client privilege to any questions which might shed light into the republication decision, presented a complete roadblock to discovering any of this information.

This Court has not spoken to the issue of defining reckless disregard in the labor dispute defamation context, other than by analogy. Those cases which have been utilized by courts below, including the Wyoming Supreme Court, have utilized the definition of reckless disregard established in the line of cases flowing from *New York Times v. Sullivan*, *supra*. Although the National Labor Relations Board as well as this Court have discussed robust debate during labor disputes, it should not necessarily follow that the strictest possible definition of reckless disregard be adopted in order to protect that robust debate. Petitioners would assert that a distinction exists between journalists publishing news and disseminating information to the public and parties in a labor dispute, which distinction requires different standards of proof. These issues are particularly troublesome when at issue is a re-publication of a statement received by one of the parties to the labor dispute from a third party containing matters completely unrelated to the labor dispute.

As with the definition of reckless disregard, the strict pre-trial proof requirements utilized by the Wyoming Supreme Court in dismissing the Petitioners' action are also founded upon cases involving communications media defendants or publications involving public officials or matters of public concern. The Wyoming Supreme Court utilized its own decisions in these types of cases as well as this Court's decision of *Anderson v. Liberty Lobby, Inc.*, ____ U.S. ____, 106 S.Ct. 2505 (1986). This Court in *Anderson* held that the clear-and-convincing standard of proof should be taken into account in ruling on a pre-trial motion in a libel suit brought by a public figure.

Based upon the discussion above concerning how the Wyoming Supreme Court erred in applying a certain definition of "reckless disregard" in a labor dispute defamation case, the Petitioners respectfully urge this Court to similarly find that utilizing the pre-trial clear-and-convincing evidence standard is not applicable in a labor dispute defamation context, particularly one involving a re-publication. A jury should have been granted the opportunity to review the evidence presented to determine the important issues of publication with malice as concerns the labor dispute publication.

Significant to an analysis of the pre-trial proof issue, and reliance upon *Anderson* by the Wyoming Supreme Court, is this Court's statement in *Anderson* that:

> Plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, *as long as the plaintiff has had a full opportunity to conduct discovery.*

Ibid. 106 S.Ct. at 2514 (emphasis added). As discussed elsewhere herein, Petitioners have not been granted a full opportunity to conduct discovery herein. Thus, this Court should grant the Petition to correct the misapplication of this Court's rulings and rectify the prejudice done to Petitioners by the lower courts requiring a certain standard of proof, yet preventing adequate development of the facts through discovery.

The Wyoming Supreme Court, by affirming the trial court's utilization of the strict pre-trial standard of proof, did not appropriately examine the differences between the case at bar and those communications media defendant cases. If that court had done so, it would have realized the necessity of presenting the matter to the jury for a factual determination. In any event, even applying *Anderson*, the lower courts have erred. The dismissal of the Petitioners' Complaint denied Petitioners their right to present the case to a jury.

II. THE WYOMING SUPREME COURT IMPROPERLY UTILIZED THE ACTUAL MALICE STANDARD CONCERNING PETITIONERS MISBRENER AND FOLEY WHO WERE NON-ACTIVE PARTICIPANTS TO THE WYOMING LABOR DISPUTE AND WHO WERE DEFAMED BY STATEMENTS UNRELATED TO THE LABOR DISPUTE.

At the time the Respondents re-published the defamatory letter authored by Dorothy Palacios, the labor dispute involved a decertification petition, and resulting election, to be held at the Sinclair Refinery. Both Petitioners Misbrener and Foley were, however, defamed by

Dorothy Palacios' statements and, subsequently, by the Respondents' re-publication of those statements, in areas either wholly unrelated to the labor dispute or tangentially related to that dispute. For example, Ms. Palacios begins her letter by describing how she had experienced during her twelve years as an employee of the OCAW a flagrant violation of her rights as a union member, as a professional employee of OCAW, as a dues payer to an OCAW Local Union, and as a citizen of the United States. App. at A-5. Ms. Palacios also accuses the OCAW leadership of being dishonest and foul,tainting all those connection to such foul leadership.

Since these types of defamatory statements, unlike the typical labor dispute defamatory statements, impugn the character of the leadership of OCAW, which includes Petitioner Misbrener and Petitioner Foley, the actual malice standard should not have been utilized by the court below in assessing whether to dismiss the Complaint filed by Petitioners Misbrener and Foley individually.

Specifically, Petitioner Foley's only connection to the Wyoming labor dispute was as a conduit of the research assignment from Misbrener to Palacios while negotiations on a new collective bargaining agreement were ongoing and much before a decertification petition was filed. Requiring Petitioner Foley to prove malice given his role in the eventual labor dispute was improper. Respondents, it is asserted, acted wrongly in publishing material concerning Foley when they were aware he had no connection to the dispute.[4] This Court, it is respectfully submitted, should grant the writ of certiorari to correct this serious error.

III. THE WYOMING SUPREME COURT, IN ANY EVENT, MISAPPLIED THIS COURT'S PRONOUNCEMENTS SURROUNDING APPLICATION OF THE MALICE STANDARD IN THE CASE OF A COMMUNICATIONS MEDIA DEFENDANT OR PUBLIC FIGURE.

The Wyoming Supreme Court quoted and relied upon this Court's

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[4]The same analysis applies to Petitioner Misbrener since he was no greater way involved in the labor dispute than Foley.

decision of *St. Amant v. Thompson*, 390 U.S. 727 (1968) for the proposition that the appropriate standard to be utilized with respect to "reckless disregard" is one which requires the plaintiff to provide sufficient evidence to permit the conclusion that a defendant in fact entertained serious doubts as to the truth of his publication. App. at A-10. However, the *St. Amant* decision, which involved a public official's defamation action, expanded upon the principle set forth by the Wyoming Supreme Court. This Court's decision in *St. Amant* actually supports the proposition that it was improper for the lower court to dismiss the Petitioners' Complaint.

In *St. Amant*, after pointing out that a publisher cannot automatically ensure a favorable verdict by testifying that he published with a belief that the statements were true, the Court described several examples where recklessness may be found. This Court included such examples as where the matter published is so inherently improbable that only a reckless man would have put it in circulation or, significant in terms of the within case, where there may be obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *Ibid.* at 732.

This Petition is not the appropriate place to set forth the extensive evidence presented below by the Petitioners which demonstrates all of the various ways reckless disregard was, in fact, shown. However, the Respondents chose to re-publish the Palacios letter when, as admitted by Holding himself, terminated employees have a proclivity to tell falsehoods. When combined with Respondent Holding's statement that he was totally unaware of how Palacios was treated during her tenure as an employee of the OCAW, a jury certainly could have found reckless disregard on the part of the Respondents in publishing the letter. At the very least, however, it was improper for the lower courts to dismiss the Petitioners' Complaint since the standards pronounced by this Court even in cases involving public officials, mandated that the Complaint not be dismissed at the pre-trial stage.[5]

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[5]It is important to point out that the record is filled with evidence which would easily allow a jury to find publication with malice, whatever definition is used. For example, malice can be inferred from the mere fact that attorney Gruender represented both Sinclair and Palacios during the decertification period, and Palacios' letter conveniently found its way to Sinclair, through Gruender. Also, Palacios' letters to Holding, particularly the January 10 1984, letter, described above, raise a question of publishing with malice.

The Wyoming Supreme Court required that Petitioners had to present more direct evidence that the Respondents, whose ill-will towards the union would have likely led them to believe any negative statement presented to them by a third party, in fact subjectively entertained serious doubts as to the truth of the published statements. The types of examples which would lead a jury to infer subjective awareness, pronounced by this Court in *St. Amant*, were completely ignored by the Wyoming Supreme Court and the trial court below. Petitioners urge this Court to grant the Petition in order that the Court can review the entire record and the of evidence presented.

IV. WHERE THIS COURT HAD SET FORTH MINIMUM ACTUAL MALICE STANDARDS TO ALLOW DEFAMATION ACTIONS IN LABOR DISPUTE LITIGATION, NOT YET FULLY DEFINED BY THIS COURT, THE WYOMING STATE COURTS' IMPROPER APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE DEPRIVES PETITIONERS' ACCESS TO THE MOST CRITICAL EVIDENCE CONCERNING ACTUAL MALICE, THEREBY DENYING THE PETITIONERS' CONSTITUTIONAL RIGHT TO ACCESS TO COURTS.

As stated above, the attorney-client privilege objection, and resulting instruction not to respond, was interposed by counsel for the Respondents to every question posed by counsel for the Petitioners inquiring into any conversation occurring with respect to, *inter alia*, the decision of whether to re-publish Palacios' defamatory letter to the employees of the Sinclair refinery. Respondents' justification for that objection was that attorney Daniel Gruender, who simultaneously represented Sinclair, Earl Holding, and Dorothy Palacios, was present while all discussions were held as to whether to publish the letter.

The blanket assertion of the attorney-client privilege had the result of denying Petitioners access to what appears to be the only direct evidence otherwise available to Petitioners concerning the actors' thought processes in re-publishing Palacios' defamatory letter. As deposition testimony of the several witnesses participating in these discussions unfolded, it was learned that attorney Gruender was

conveniently present at every discussion where the critical decisions were made.

Important in the analysis of the assertion of the attorney-client privilege is the unique fact pattern presented by the within case concerning the alleged defamation. Unlike instances where a union or employer is preparing a document or other publication to be distributed during a labor dispute, the within case involves the re-publication by Respondents of a letter authored by a former OCAW employee and dealing with matters beyond the scope of the labor dispute at issue. Significantly, therefore, although the Petitioners were generally able to inquire of the authoress of the letter of her thought processes in preparing the letter and making the statements contained therein, the issue in this case revolves around the thought processes of the re-publisher, who is generally held to the same standard of an original publisher. *See, e.g., Restatement of the Law (2nd) Torts*, § 578. The ability to inquire of the re-publishers as to their state of mind, particularly concerning those matters unrelated to the labor dispute, takes on even greater significance.

Although the Wyoming Supreme Court responded to most of the several specific theories asserted by the Petitioners as to why the attorney-client privilege was erroneously utilized, the Wyoming Supreme Court, and the trial court, significantly failed to discuss one critical theory—the long-standing policy, announced by this Court on several occasions concerning other privileges, that the attorney-client privilege is not absolute but, rather, restricts the search for the truth and, if applicable at all, must be narrowly confined. *See, e.g., Trammel v. United States*, 445 U.S. 40 (1980); *United States v. Nixon*, 418 U.S. 683 (1974). This Court stated the rule, which rule has also been established by the Supreme Court of Wyoming [*Hopkinson v. State*, 632 P.2d 79 (Wyo. 1981)], succinctly as follows:

> Testimonial exclusionary rules and privileges contravene the fundamental principle that "'the public . . . has a right to every man's evidence.'" *United States v. Bryon*, 339 U.S. 323, 321 (1950). As such they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or

> excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting). *Accord*, *United States v. Nixon*, 418 U.S. 683 (1974).

Trammel v. United States, 445 U.S. at 50-51.

Justice Urbigkit dissenting in the Wyoming Supreme Court's decision below, recognized the unfairness of the majority's attorney-client privilege ruling in stating:

> The proof necessary for the Union to respond to the motion [the Respondents' Motion for Summary Judgment] was extrapolated to be undiscoverable under a collusive shield of attorney-client privilege, since the two parties, by agreement, happen to "coincidentally" employ the same attorney. Conversely to that immunization, I would apply a rule of necessity to determine privilege and discoverability.
>
> * * *
>
> The crucial question in this case becomes: How can the Union develop *specific facts* showing that there is a genuine issue for trial and thus defend against the summary-judgment motion filed by the defendants in the defamation action?

App. at A-19 - A-20, footnote omitted, emphasis in original. Although Justice Urbigkit was able to analyze the circumstances of this case in the context of the wrongful shielding of evidence by the Respondents, the majority below failed to consider that the privilege must yield to the need for discovery in the search for the truth.[6]

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[6]Indeed, the unusual relationships between Palacios and Gruender and Gruender and Holding, at the same time Palacios was battling with the Union for her job, accentuate that the threshold to be overcome to allow discovery, assuming the privilege applies, should be lower. The need for the information was demonstrated to the courts below, yet no justice in applying the balancing test was given to Petitioners.

For purposes of the within Petition, this Court created a minimum malice standard in *Linn v. Plant Guard Workers*, *supra*, applicable at least in actions involving a labor dispute. The Wyoming courts' improper application of the attorney-client privilege, particularly in light of the re-publication issue in this case, deprived the Petitioner OCAW and the individual Petitioners in this case of their constitutionally protected right to access to the courts, which access is the only means available to the Petitioners to attempt to vindicate the wrongs done to them.

This Court has held that, at a minimum, due process requires that, absent countervailing state interests of overriding significance, persons forced to settle their claims of right and duty through a judicial process must be given a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). The lower courts' glaring acceptance of the attorney-client barrier to Petitioners' rights of discovery, in the context of the within case, fails to satisfy due process owing Petitioners pursuant to the Fourteenth Amendment to the United States Constitution inasmuch as the rulings below operate to foreclose the Petitioners' opportunity to be heard. *Ibid.* at 380.

This injustice is compounded by the lower courts' refusal to allow Petitioners to utilize the inferences and indirect evidence, including the negative inference which can be drawn by the assertion of the attorney-client privilege, itself, to meet the burden placed upon the Petitioners. This Court can rectify this injustice by granting the Petition for Writ of Certiorari.[7]

V. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI SINCE THE WYOMING SUPREME COURT MISAPPLIED *GERTZ v. ROBERT WELCH, INC.*, 418 U.S. 323 (1974) IN DETERMINING THAT MOST OF THE DEFAMATORY LETTER CONSTITUTED PROTECTED OPINION.

[7]The reasoning of the Wyoming Supreme Court also leaves a poor precedent that one can avoid liability in a labor dispute context by having a third party prepare a statement but ensure an attorney is present at all pertinent discussions. In that way, the "direct evidence" required by the Wyoming Supreme Court to be presented can never be discovered or presented to the fact finder.

Relying upon this Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the trial court below, as affirmed by the Wyoming Supreme Court, determined that most of the defamatory letter authored by Dorothy Palacios constituted protected opinion. App. at B-5. In *Gertz* this Court established the idea that no cause of action may be brought for the publication of a false idea or opinion, although no constitutional value exists in false statements of fact. *Gertz* at 339-340.

Petitioners urged the Wyoming Supreme Court to reverse the trial court's finding that most of the letter constituted protected opinion since, *inter alia*, the authoress begins the letter with a statement *"There are some facts you should know."* App. at A-4 (emphasis in original). At the very least, Petitioners urged, the issue was a disputed issue which should have been presented to the trier of fact.

Nonetheless, ignoring the statement made by the very authoress of the letter, as well as an affidavit submitted to the Court below from an individual who received the letter on the day it was published, stating that he believed the letter constituted and included statements of fact, the Wyoming Supreme Court dismissed most of the letter as consisting of non-actionable statements of opinion.

This Court should grant the Petition in order to correct the misapplication by the Wyoming Supreme Court of the principle of protected opinion. The expansive view of the lower courts to the theory of protected opinion, which allowed the trial court to find, for example, that Palacios' statement that she personally experienced flagrant violations of her rights constituted a statement of opinion, leaves open the door that all but the fewest statements made would ever constitute statements of fact.

CONCLUSION

Based upon the foregoing, therefore, the Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted:

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APPENDIX

APPENDIX A

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1987

December 22, 1987

No. 86-239

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, JOHN E. FOLEY, and JOSEPH M. MISBRENER,

Appellants
(Plaintiffs),

v.

SINCLAIR OIL CORPORATION, a Wyoming and Delaware corporation, EARL HOLDING, individually, and as Director and Officer of Sinclair Oil Corporation, J. R. McIntire, individually and as Refinery Manager and employee of Sinclair Oil Corporation, and JOHN DOE(S), whether singular or plural, that individual or those individuals who participated in the republishing of the defamatory, statement,

Appellees
(Defendants)

Appeal from the district court of Carbon County, the Honorable Robert A. Hill, Judge.

Richard Rideout of Freudenthal, Salzburg, Bonds & Rideout, Cheyenne, and Donald J. Mares of Law Office of John W. McKendree, Denver, Colorado, for appellants; argument by Mr. McKendree.

Glenn Parker and James Applegate of Hirst & Applegate, Cheyenne, and Dan. S. Bushnell of Kirton, McConkie & Bushnell, Salt Lake City, Utah, for appellees; argument, by Messrs. Applegate and Bushnell.

Before BROWN, C.J., and THOMAS, CARDINE, URBIGKIT, and MACY, JJ.

CARDINE, J., delivered the opinion of the court; URBIGKIT, J., filed a dissenting opinion.

CARDINE, Justice.

The stakes were high. The union, OCAW, and Sinclair Oil Corporation were locked in a contest for votes of Sinclair employees in a union decertification election. ALS expected, each party was commendably zealous in free and open debate presenting their respective positions. A letter, critical of the union and its officers, written by a former employee of OCAW, was circulated among Sinclair employees. OCAW lost the election. An action for damages, claimed to result from defamation by the letter, was brought against Earl Holding and other officers and representatives of Sinclair. OCAW and its officers lost the lawsuit by summary judgment. They now appeal to this court, raising the following issues: (1) whether the trial court erred in applying a subjective definition of actual malice and an evidentiary standard of convincing clarity; (2) whether the trial court erred in refusing to strike a supplemental memorandum and appendix filed by appellees in support of their motion for summary judgment; (3) whether the trial court erred in ruling that questions propounded to certain witnesses sought information which was protected by the attorney-client privilege; (4) whether the trial court erred in granting appellees' motion for summary judgment because of the existence of credibility issues; (5) whether factual issues existed which precluded summary judgment; (6) whether the trial court improperly relied upon incompetent testimony of appellants Misbrener

and Foley; and (7) whether the trial court erred in concluding as a matter of law that significant portions of the alleged defamatory letter constituted protected opinion.

We affirm.

FACTS

The present controversy concerns events surrounding a 1984 union decertification election held at the Sinclair Oil Corporation refinery in Sinclair, Wyoming. Prior to the election, Local 2-269 of the Oil, Chemical and Atomic Workers Union (OCAW) was the exclusive bargaining agent for employees at the Sinclair Refinery. Appellant Oil Chemical and Atomic Workers International Union (OCAWIU) is the international union with which the local union was affiliated.

From 1972 to 1983, Dorothy Palacios was employed by OCAWIU as an international representative. Early in 1983, appellant John "Jack" Foley, her supervisor, asked her to conduct research in the southern California area to obtain information which might be helpful to the union in negotiations with the Sinclair Refinery. Specifically, the union sought information concerning the Sinclair corporation, refinery owner Robert Earl Holding, and other businesses in which Holding had an interest.

In accordance with her instructions, Ms. Palacios traveled to San Diego and conducted a search of public records. She also visited the Westgate Hotel in San Diego, an enterprise owned for appellee Holding or one of his entities. While at the hotel, she happened to meet Mr. Holding and spoke with him briefly. Ms. Palacios then prepared a report on her investigation and submitted it to appellant Joseph M. Misbrener, who at that time was the vice president of the union.

In August of 1983, Ms. Palacios filed a harassment grievance against OCAW. In September, she was terminated as an employee of OCAWIU. Following her termination, she filed an unfair labor practice charge with the National Labor Relations Board (NLRB) and a discrimination complaint with the Equal Employment Opportunity Commission.

Ms. Palacios then contacted appellee Holding and apologized for conducting the 1983 investigation. She also asked him for assistance in finding counsel to represent her in her grievances against the union. In a letter to Mr. Holding dated January 10, 1984, she made the following statements:

> "It is difficult for me to ask for help, but I find it now necessary as I have discovered that it is indeed not simple to find the proper attorney to take such a case. * * * It is, though, with the thought that you, too, should benefit and that, perhaps, aspects of the case will surface which may be of help to you in your association with that organization and I would have it understood with the attorney that any material that arose would be available to you and not submerged by the usual fiduciary attorney/client relationship."

In response to this letter, Ms. Palacios received a call from Daniel Gruender, an attorney whose firm represented Sinclair Oil and several of Holding's entities. Ms. Palacios was aware that Mr. Gruender's firm represented Sinclair. Mr. Gruender eventually agreed to represent Ms. Palacios in her grievance against OCAWIU. At the same time, he and his firm ere involved in the proceedings at the Sinclair Refinery.

Ms. Palacios learned from Mr. Gruender that a decertification election was to be held at the Sinclair Refinery in April of 1984. The purpose of the election was to allow the union members to determine whether OCAW should be decertified as the bargaining agent for the refinery employees. Ms. Palacios then authored the following letter addressed to the OCAW-represented employees of the Sinclair Refinery:

> "It has come to my attention that you are preparing for an election on April 26, 1984. *There are some facts you should know.*
>
> "For nearly 12 years, I had been an International Representative for OCAW; I wish that I could praise the union, but,

sadly, I cannot. Having experienced, personally, flagrant violation of my rights by OCAW as a union member; as a professional employee of OCAW; as a dues payer to an OCAW Local (also the Staff union, IRCU); and as a USA citizen, I was obligated to file a discrimination/harassment grievance against the OCAW Administration which so angered them that I was terminated from my employment one month later. For public record, both EEOC and NLRB charges have been filed against OCAW. This, of course, is my personal problem. *The subject of serious concern to you follows*:

"One of the assignments I was given as an International Representative for OCAW was to research records and background of your employer, Robert Earl Holding. This assignment came to me from Joe Misbrener, now International President of OCAW, through his Assistant, Dean Alexander, to District 1 Director Jack Foley. Foley told me (quote verbatim)..."Dig up all the dirt you can find on this guy. Joe needs to get something on him...they're having some trouble with Sinclair."

"I found this 'assignment' distasteful, insulting and offensive since I considered myself a qualified organizer and not a vulgar spy for those who must ply their trade by trashy, unethical practices...nor did I aspire to be a 'digger of dirt.' However, I admit that I rationalized that, after all, I was accepting my salary and was obliged to carry out the assignment as instructed by my employer. I performed the investigation with care and extreme diligence. Guess What?

"THE INVESTIGATION REVEALED ABSOLUTELY NOTHING EITHER BAD OR EVEN REMOTELY UNSAVORY ABOUT MR. HOLDING! TO THE CONTRARY...I FOUND ONLY VERY GOOD REPORTS ABOUT HIM!

"OCAW must have been displeased by this fact because I

never had *one word* from *any* of them *nor even one comment* regarding the 12-page report I sent to Misbrener via certified mail. I received only the returned receipt showing proof of delivery.

"My investigation led to acquaintance with many of Mr. Holding's employees. When I, tactfully, led the conversation to the subject of the union, I was told by the employees that they were not sorry for having decertified the union two years earlier. Admittedly, I was surprised to hear this from the employees.

"They spoke of Mr. Holding and his family with warm enthusiasm and genuine sincerity. They assured me that Mr. Holding was a man of integrity whose word was as iron-clad, as binding, as any union contract!

"Neither could I find, though I searched, any employee who suffered any loss as a result of eliminating the union. That these employees so respected, even revered, their employer aroused my curiosity. They had made it very clear to me that they were not about to reorganize with the union...to turn their backs on an employer who treated them well...even after two years of having been without a union.

"Released from my employment by OCAW, I am now free of any obligation to remain silent about that investigation. I could not have addressed you as I am now doing while I was still on the union's payroll. Neither, ordinarily, would I voluntarily write to a group of employees about union assignments. In this case, however, I was part of an action intended, undeservedly, to malign your employer and I want to take part in clearing the record.

"That 'assignment' proved to be a turning point in my life and I was forced to reason...not rationalize...about this shabby, low affair of 'digging dirt' or 'throwing mud' to attempt to smear a gentleman of excellent character...as verified by his own workers. Was *this* why I had joined the union? Certainly not! Mr. Holding doesn't know me nor does he need my testimonial to any virtue he possesses; but I felt the need to apologize *for* OCAW. The leadership has abdicated any sense of decency in their desperation to keep their political boat afloat.

"Honest union leaders do not need to 'dig dirt' nor stoop to the foul play to which I've been exposed in the last years of my employment by OCAW. Why do OCAW so-called leaders need to 'dig dirt'? Were they planning blackmail, presuming to call it 'negotiations'? Was this the intent of such 'investigation'? I do not know. I know only this fact: while, I repeat, there was not one mark against the Holdings, THE GOOD WAS HIGHLY VISIBLE!

"If I were a Sinclair employee, I'd encourage productivity for the benefit of everyone, and I'd give Mr. Holding an opportunity to work unhampered by an 'dirt-seekers.'

"Remember, foul 'leadership' leads where you cannot afford to follow and taints all those connected to it. I used to believe that you could remain above it, stay clear of the 'mud.' Not so. Some of it always sticks to your fingers and is hard to clean off.

"Good luck in your election!

"/s/

"Dorothy A. Palacios

"Former Int'l. Rep. - OCAWIU" (Emphasis in original.)

Ms. Palacios testified that while no one had requested her to prepare the letter, she mailed it to Mr. Gruender and toldhim he could use it if it would be helpful. She also provided to Mr. Gruender a copy of the report of her investigation of Mr. Holding and a copy of the telegram from OCAWIU requesting that she perform the assignment.

Daniel Gruender delivered the letter to the management of the Sinclair Refinery. Several meetings were then held to determine whether to distribute the letter to Sinclair employees. Daniel Gruender took part in these discussions. Appellee Holding and other Sinclair personnel asked the Rawlins Daily Times to publish the letter, but the newspaper declined. The next morning, Daniel Gruender and others again met with representatives of the Daily Times. The

newspaper then contacted Dorothy Palacios and the union representatives to discuss the letter's contents, and eventually printed an article containing excerpts from the letter. On the evening before the decertification election, appellees distributed the Palacios letter to Sinclair employees, along with a cover letter authored by appellee J. R. McIntire. OCAW lost the election the next day.

On February 22, 1985, appellants filed a complaint against appellees, alleging libel and civil conspiracy. After considerable discovery had been conducted, appellees filed a motion to dismiss or, in the alternative, for summary judgment. Appellants then filed a motion to compel discovery, challenging appellees' assertions of the attorney-client privilege. On February 28, 1986, the trial court entered an order sustaining many of appellees' attorney-client privilege objections. After further discovery was conducted, the court granted appellees' motion for summary judgment. In a decision letter, the court indicated that appellees were entitled to summary judgment for two reasons. First, the court concluded that appellants had failed to demonstrate with convincing clarity that appellees acted with actual malice in publishing the alleged defamatory material. Second, the court ruled that as a matter of law the alleged defamatory material consisted of nonactionable opinion. Either one of the alternative rulings, if correct, provided a sufficient basis for the entry of summary judgment against appellants. We affirm the trial court's conclusion that appellants failed to provide clear and convincing evidence to demonstrate actual malice.

I. ACTUAL MALICE

In the crucible of a labor conflict, clashes between the right of free discussion and one's right to be free from defamation are virtually inevitable. This problem was addressed by the United States Supreme Court in Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 86 S.Ct. 657, 14 L.Ed.2d 582 (1966). In Linn, the Court was faced with the question of whether, and to what extent, the National Labor Relations Act preempted the availability of state remedies for libel. In striking a balance between the "congressional intent to encourage free debate on issues dividing labor and management" and

the "'overriding state interest' in protecting its residents from malicious libels," the Court concluded that in the labor dispute context, state libel remedies were available only if a plaintiff could demonstrate actual malice. Id., 86 S.Ct. at 664. The Court thus adopted '[t]he standards enunciated in New York Times Co. v. Sullivan," 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

In New York Times Company v. Sullivan, the Court defined "actual malice" as libel issued "with knowledge that it was false or with reckless disregard of whether it was false or not." Id. 84 S.Ct. at 726. In a subsequent case, the Court stated that in order to show reckless disregard, a plaintiff must provide "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 88 S. Ct. 1323, 1325, 20 L.Ed.2d 262 (1968); see also Adams v. Frontier Broadcasting Company, Wyo., 555 P.2d 556 (1976); MacGuire v. Harriscope Broadcasting Co., Wyo., 612 P.2d 830 (1980).

As explained in McMurry v. Howard Publications, Inc., Wyo., 612 P.2d 124, 18 (1980), the New York Times actual malice standard is a subjective one which focuses on the defendant's state of mind:

> "'knowledge of falsity' involves a *subjective* awareness of the falsity of the statements, and 'reckless disregard' involves sufficient evidence to permit an inference that the defendant must have, in fact, *subjectively* entertained serious doubts as to the truth of the statements." (Emphasis in original.) Rooney, J., specially concurring.

Appellants argue that while this subjective definition of actual malice is appropriate in cases involving media defendants, it is inappropriate in cases involving labor disputes. We find no merit in this contention. The actual malice standard is applied in media-defendant cases to protect the principle that "debate on public issues should be uninhibited, robust, and wide-open * * *." New York Times v. Sullivan, supra, 84 S.Ct. at 721. This principle applies with equal force in the labor dispute context. In Linn v. United Plant Guard Workers of America, Local 114, supra, 86 S.Ct. at 663, the Supreme Court said:

"We acknowledge that the enactment of § 8(c) [of the NLRA] manifests a congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered 'against the background of a profound * * * commitment to the principle that debate * * * should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.' New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). Such considerations likewise weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." (Footnote omitted.)

Moreover, the case law of other jurisdictions provides abundant support for the proposition that the New York Times subjective actual malice standard, as refined by St. Amant v. Thompson, supra, applies in the labor dispute context. See Tosti v. Ayik, 394 Mass. 482, 476 N.E.2d 928, 935 (1985); Raffensberger v. Moran, 336 Pa.Super. 97, 485 A.2d 447, 453 (1984); Meuser v. Rocky Mountain Hospital, Colo.App., 685 P.2d 776, 779 (1984); Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of America, 6 Ohio St.3d 369, 453 N.E.2d 666, 669 (1983); Montana v. Smith, 92 A.D.2d 732, 451 N.Y.S.2d 603, 604 (1983). We hold that the trial court correctly applied the actual malice standard.

II. CONVINCING CLARITY

In determining whether appellants provided sufficient evidence to defeat appellees' motion for summary judgment, the trial court applied the evidentiary standard of convincing clarity. Appellants claim that the trial court erred in applying this standard. We disagree.

The requirement that a plaintiff must demonstrate actual malice with convincing clarity was articulated in New York Times Company v. Sullivan, supra. In Linn v. United Plant Guard Workers of America, Local 114, supra, the Court stated that the "standards" enunciated in New York Times Company apply in libel cases involving labor disputes. Linn, supra, 86 S.Ct. at 664. Thus, the clear and convincing

standard is appropriate in this case. See Meuser v. Rocky Mountain Hospital, supra.

In Adams v. Frontier Broadcasting Co., supra, 555 P.2d at 562, we said that

> "[i]n ruling upon the presence of a genuine issue of fact as to the existence of actual malice the trial judge must decide whether:
>
> "'[T]he plaintiff has offered evidence of a *sufficient quantum to establish a prima facie* case, and the offered evidence *can be equated with the standard or test of "convincing clarity"* prescribed by United States Supreme Court decisions * * *.'" Chase v. Daily Record, Inc., 83 Wash.2d 37, 43, 515 P.2d 154, 157 (1973).
>
> "Accord, United Medical Laboratories v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968), cert. den. 394 U.S. 921, 89 S.Ct. 1197, 22 L.Ed.2d 454 (1969); Buchanan v. Associated Press, 398 F.Supp. 1196 (D.D.C. 1975)."

See also McGuire v. Harriscope Broadcasting Co., supra 612 P.2d at 832. The United States Supreme Court approved this approach to summary judgment in cases falling under the New York Times Company rule in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In Anderson, the Court explained that the requirement of clear and convincing evidence of actual malice was appropriate at the summary judgment stage because "the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." 106 S.Ct. at 2512.

The trial court did not err in requiring appellants to provide clear and convincing evidence of malice in order to defeat appellees' summary judgment motion.

III. REFUSAL TO STRIKE

Appellants next contend that the trial court erred in refusing to strike appellees' supplemental memorandum in support of their motion for summary judgment because it contained misleading, scandalous and impertinent material. They also contend that the court erred in not striking as untimely filed an appendix filed in support of the supplemental memorandum. We will not address these contentions at length because even if we assume that the trial court erred in denying appellants' motion to strike and we disregard the materials in the disputed documents, the outcome of this appeal would not be affected.

Appellees' initial memorandum and supporting documents, filed months before the summary judgment hearing, provided sufficient evidence to establish the absence of a genuine issue of material fact ont he dispositive question of whether appellees acted with actual malice. Those materials demonstrated that appellees believed the contents of the Palacios letter because of telephone conversations in which Ms. Palacios apologized for conducting the investigation, her letter asking for assistance in finding an attorney, and the telegram describing the assignment. Our discussion here is confined to that portion of the letter in which Ms. Palacios quotes appellant Foley as stating "[d]ig up all the dirt you can find on this guy. Joe needs to get something on him...they're having some trouble with Sinclair." Ms. Palacios' statement that Foley said these words is clearly a statement of fact. The entire remainder of the letter either consists of factual assertions which are not defamatory or statements which are treated as nonactionable opinion in the labor dispute context.

> "[W]here potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." Gregory v. McDonnell Douglas Corporation, 17 Cal.3d 596, 131 Cal.Rptr. 641, 644, 552 P.2d 425, 428 (1976).

Appellees met their burden under Rule 56, W.R.C.P. even without the materials in the supplemental memorandum and appendix. Cf. Hickey v. Burnett, Wyo., 707 P.2d 741 (1985).

Simply stated, the trial court's refusal to strike appellees' supplemental memorandum and appendix did not rise to the level of prejudicial error.

IV. ATTORNEY-CLIENT PRIVILEGE

During the course of discovery, appellees continually asserted the attorney-client privilege in response to virtually all questions regarding communications made in the presence of attorney Daniel Gruender. These communications can be divided into two categories: (1) communications between Dorothy Palacios and Daniel Gruender; and (2) discussions among Daniel Gruender and Sinclair personnel, including appellees Holding and McIntire, concerning the decision to distribute the Palacios letter.

With respect to the first category, appellants argue that Dorothy Palacios expressly waived the attorney-client privilege by the language contained in her letter to appellee Holding dated January 10, 1984. The attorney-client privilege is limited to

> "those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended. * * * Wherever the matters communicated to the attorney are intended by the client to be made public or revealed to third persons, obviously the element of confidentiality is wanting." E. Cleary, McCormick on Evidence, § 91 at 217 (3d Ed. 1984).

An exception to this rule arises when the same attorney represents two clients who share information on a matter of common interest:

> "When two or more persons, each having an interest in some problem, or situation, jointly consult an attorney, their confidential communications with the attorney, though known to each other,

will of course be privileged in a controversy of either or both of the clients with the outside world, that is, with parties claiming adversely to both or either of those within the original charmed circle." McCormick, supra, at 219.

The classic example of this joint client exception occurs when two clients "walk into the lawyer's office together and retain him to represent both of them in the same matter." C. Wright and K. Graham, Federal Practice and Procedure: Evidence § 5505 at 556. Although this did not happen in the present case, Dorothy Palacios and appellees shared the same attorney, and a significant identity of interest existed between them. As stated by appellants in their brief, appellee Holding and Dorothy Palacios engaged in a "joint effort to fight the OCAWIU." We hold that the joint client exception applies under these circumstances. The district court did not err in ruling that the communications between Dorothy Palacios and Daniel Gruender were protected by the attorney-client privilege, nor did the ruling result in injustice or in the judgment entered being a sham.

With respect to the second category of questions, those which relate to meetings held in the presence of Daniel Gruender in the days before the decertification election, appellants assert that the appellees waived the attorney-client privilege by raising malice as an affirmative defense and by asserting that the decision to publish the letter was made with advice of counsel.

Appellants have cited no authority to support the proposition that a libel defendant waives the attorney-client privilege by raising lack of malice as a defense. They argue, however, that "malice has been made an issue by the affirmative acts of the Appellees, as well as potentially by operation of law," and that in the interest of fairness all attorney-client communications which are relevant to the malice issue should be discoverable.

We find no merit in appellants' contention that malice became an issue as a result of appellees' "affirmative acts." When, as in this case, malice is an element of a libel action, the burden of pleading and proving that element rests on the plaintiff. R. Smolla, Law of

Defamation, § 3.06 (1986). Consequently malice became an issue in this case when appellants filed their complaint.

We are also unpersuaded by appellants' argument that appellees waived the attorney-client privilege by stating during discovery that their decision to publish the Palacios letter was made with the advice and assistance of counsel. We recognize that reliance upon a defense of advice of counsel has, in some circumstances, been held to constitute a waiver of the attorney-client privilege. See, e.g., United States v. Mierzwicki, 500 F.Supp. 1331 (D.Md. 1980). In this case, however, appellees did not rely on advice of counsel as a defense. They merely stated, in response to questions posed by appellants' counsel, that Daniel Gruender participated in the decision to publish the Palacios letter and helped prepare a cover letter for it. We reject appellants' assertions that these discovery responses amounted to a waiver of the privilege.

Appellants next contend that the attorney-client privilege does not apply to many of the communications at issue because they involved contemplated tortious acts. In Hopkinson v. State, Wyo., 664 P.2d 43, 66-67 (1983), we held that the privilege is inapplicable to communications made to further a crime or fraud. Although some jurisdictions have enlarged the crime or fraud exception to include contemplated torts, the wisdom of this expansion of the exception has been questioned.

> "Broadening the exception in such ways might lead, at least initially, to greater disclosure (more evidence with which to get at the truth), but in the long run surely the effect would be to discourage clients from attempting to conform their conduct to legal requirements and to discourage lawyers from seeking information from clients in order to advise them effectively * * *." 2 D. Louisell and C. Mueller, Federal Evidence § 213 at 823-824.

We find this reasoning persuasive, and we decline to adopt an exception to the attorney-client privilege for contemplated tortious acts.

Finally, appellants assert that the trial court upheld the privilege in several situations in which appellants' discovery questions did not seek information concerning legal advice of an attorney while acting as an attorney. This assertion is unsupported by the record. All the questions in which the assertion of the attorney-client privilege was upheld required answers concerning communications made in the presence of Daniel Gruender while providing advice to his clients.

V. ISSUES OF MATERIAL FACT

Appellants contend that the trial court erred in granting summary judgment because significant issues of fact existed concerning the credibility of appellees Holding and McIntire. In support of this argument, appellants point to two purported inconsistencies. First, in their affidavits, appellees Holding and McIntire stated that their belief in the truth of the contents of McIntire stated that their belief in the truth of the contents of the Palacios letter was based upon information contained in a telegram from appellant Foley and a copy of Dorothy Palacios' report on her investigation, while in their answers to appellants' interrogatories they added additional factors they relied upon. Second, appellees Holding and McIntire stated in their affidavits that the decision to publish the letter was made by themselves while there answers to interrogatories indicate that they consulted with Daniel Gruender before making the decision.

This court has noted that summary judgment may not be proper when an action involves issues concerning state of mind and credibility. Bryant v. Hornbuckle, Wyo., 728 P.2d 1132 (1986). We have also stated that "[i]f the evidence presented * * * does not raise sufficient doubt of an affiant's credibility, a party's desire to test his statements by a jury will not preclude summary judgment." Id. at 1137.

The United States Supreme Court addressed this issue as it relates to libel cases in Anderson v. Liberty Lobby, Inc., supra, in which the Court made the following observations:

> "Respondents argue * * * that whatever may be true of the applicability of the 'clear and convincing' standard at the summary

judgment or directed verdict stage, the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on Poller v. Columbia Broadcasting Co., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), for this proposition. We do not understand Poller, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of * * * legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." Id., 106 S. Ct. at 2514.

We conclude that purported inconsistencies in appellees' testimony did not create a genuine issue of material fact.

Appellants assert that apart from the purported credibility issues, other issues of fact exist on the question of actual malice. While they contend that the evidence demonstrates several factors to support a finding of actual malice, in our view the only evidence which might arguably support such a finding is appellees' knowledge that Dorothy Palacios, the author of the letter, was biased against the union. Appellees' knowledge of her ill will toward appellants, however, does not by itself prove knowledge of probable falsity of the alleged defamatory statement, Hotchner v. Castillo-Puche, 551 F.2d 910, 913-914 (2nd Cir. 1977); see also Loeb v. New Times Communications Corp., 497 F.Supp. 85, 92-93 (S.D.N.Y.) 1980), nor dies it impose on appellees "an additional burden of extensive independent investigation." Loeb v. New Times communications Corp., supra, n.12. The district court did not err in concluding that no genuine issue of material fact existed on the question of whether appellees acted with actual malice.

VI. INADMISSIBLE TESTIMONY

Finally, appellants assert that the trial court erroneously relied upon inadmissible testimony in entering summary judgment for appellees. Specifically, appellants assert that the following deposition testimony was inadmissible on the grounds of foundation and competency:

> "Q: 'Now is there any specific act of malice or recklessness or wanton conduct that you think were [sic] committed by Sinclair or by Mr. Holding or Mr. McIntire other than circulation of the two letters?
>
> [Objection omitted.]
>
> "A: 'I know of no other action that attaches to me personally, no . . .'"

Relying on this testimony, the trial judge stated in his opinion letter that he found it "dispositive" that "both plaintiffs Foley and Misbrener acknowledged that neither knew of any act or statement on the part of Sinclair, Holding, or McIntire which would indicate malice or recklessness on the part of defendants, other than circulation of the Palacios letter." Appellants correctly point out that there is nothing in the record to indicate that Foley and Misbrener knew the meaning of the legal terms contained in the question quoted above. Accordingly, we do not find it dispositive that appellants admitted in their depositions that they were unaware of any evidence in the record before us supports such a finding, applying the evidentiary standard of convincing clarity. The record is devoid of such evidence; and, as a result, we affirm the district court.

Affirmed.

URBIGKIT, Justice, dissenting.

The court here deter,mines that granting defendant Sinclair's motion for summary judgment was proper because the Union, as plaintiff, did not show actual malice as a subjective criterium when focused

on the state of mind of the defendant's decisionmakers in questioning whether affidavit and deposition evidence was sufficient to establish a triable issue of fact. However, the reason why the Union could not show malice is the crux of this case: the attorney-client privilege, and whether it was properly applied in denial of plaintiff's discovery. In rejection of that pre-motion hearing discovery, the majority finds no waiver of the privilege, and relies on three theories: (1) the joint-client exception; (2) the raising of malice as an affirmative defense; and (3) the advice of counsel.

I dissent, and would find the malice evidence as hidden information to be discoverable because the data is necessary for review by the court in decision on defendant's summary-judgment motion. The proof necessary for the Union to respond to the motion was extrapolated to be undiscoverable under a collusive shield of attorney-client privilege, since the two parties, by agreement, happened to "coincidentally" employ the same attorney. Conversely to that immunization, I would apply to a rule of necessity to determine privilege and discoverability.[1]

Admissibility at trial is not of proper present focus, since the litigation proceeded only to the summary-judgment level and is consequently to be reviewed against the backdrop of such criteria. Factually, Sinclair moved for a motion to dismiss or in the alternative for summary judgment, with supporting affidavits. At that point, the burden shifted, and it became incumbent on the Union as the respondent to show there were material issues of fact. In Cordova v. Gosar, Wyo., 719 P.2d 625, 636 (1986), this court cited Matsuishita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), and expressed the view that:

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[1]To change the sceneario and contemplate tht the disillusioned author of a critical election-date attack in a labor conflict vote had been employer's agent, or even an investigator retained by the employer's law firm, and who, after jumping ship, was led in employment-contract dispute to be represented by the Union's lawyers—would even-handed justice still envelop a malice issue byu insulation of privilege in favor of the Union, or would the happenings between the employee and his new-found lawyers be discoverable in the suit between the employer and the Union, whether founded in libel, slander or perhaps internatinal interference with a contract?

"'* * * [w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. [Citations.] In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a *genuine issue for trial*." Fed.Rule Civ.Proc. 56(e) (emphasis added.)'"

The information of what occurred must be evaluated in the light of the facts surrounding the parties when this court examines the entire record, Wyoming Insurance Department v. Sierra Life Insurance Co., Wyo., 599 P.2d 1360 (1979), and considers this record from the viewpoint favorable to the party opposing the motion, the respondent. Greenwood v. Wierdsma, Wyo., 741 P.2d 1079 (1987); DeHerrera v. Memorial Hospital of Carbon County, Wyo., 590 P.2d 1342 (1979).

The crucial question in this case becomes: how can the Union develop *specific facts* showing that there is a genuine issue for trial and thus defend against the summary-judgment motion filed by the defendants in the defamation action? The very nature of this suit commands that malice in publication is intrinsically involved. Consequently, to respond to the motion, the Union tried to discover the character of the conduct that the defendants engaged in--the character of the conduct which was inherently involved in the preparation of the joint representation and activity with their common attorney who, by the defendants' own admission, participated in the decision to publish the letter. This discovery was subsequently denied on the basis of attorney-client or, more appropriately, "attorney-clients" privilege, which justifies the summary judgment after the Union was foreclosed from discovering the facts necessary to refute the summary-judgment motion. The theoretical validity of a limited privilege as enunciated by this court in Greenwood v. Wierdsma, supra, is justified even more by the factual parameters of this case.

By holding as they do, when the state of mind of the parties is at issue, the majority put their stamp of approval on the approach here taken that the subjective intent of the parties can be hidden by employing a common attorney and using the attorney-client privilege. A

defendant can subsequently move for summary judgment and thwart the nonmoving party from discovering the facts necessary to fight such a motion. The underlying facts are permitted to be concealed, with the spoils going to the party who secreted them. Such, a practice I cannot condone. The persuasive philosophy on the comparable Shield Law privilege-discovery dispute as elucidating fundamental constitutional concerns in Hatchard v. Westinghouse Broadcasting Co., Pa., 532 A.2d 346 (1987), affords precedential support for discovery in this case.

The majority correctly point out that malice is an element of the libel and thus the burden of pleading and proving that element rests on the plaintiff, and became an issue when the Union filed their complaint. However, the defendants, by affirmative acts, did place lack of malice in issue. The defendants in their answers to the amended complaint list 16 separate defenses, five of which directly refer to lack of malice on their part:

> "21. As a further and separate defense, Defendants allege that they, at no time bore any malice or ill will toward Plaintiffs or any of them, but acted in full belief of the truth and verity of the statements in the Palacios letter.
>
> * * * * *
>
> "25. As a further and separate defense, Defendants allege that the matters complained of are privileged under the guarantees of the First and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 20 of the Constitution of the State of Wyoming because Plaintiffs are public figures and the subject publication was not made with any malice, or intent to harm the Plaintiffs.
>
> "26. As a further and separate defense, Defendants allege the matters complained of are privileged in that the subject publication involves matters of public interest and was not made with any malice, or intent to harm the Plaintiff.

"27. As a further and separate defense, Defendants allege that the matters complained of are privileged in that any publication made by these Defendants to other persons was upon a subject in which both have an interest and was not made with any malice, or intent to harm the Plaintiffs.

"28. As a further and separate defense, Defendants allege that the statements complained of were published in the course of a labor dispute and as such are privileged and immune for a libel claim since they were not published with actual malice, nor with knowledge of their falsity nor with reckless disregard of whether they were true and false nor were the Plaintiffs injured thereby."

Recently, some courts have taken a more justice-interest view of the placing-at-issue waiver of the attorney-client privilege, by applying what has been labeled as the Hearn analysis. Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975); United States v. Exxon Corporation, 94 F.R.D. 246 (D.D.C. 1981). See also *Developments in the Law, Privileged Communications*, 98 Harv. L. Rev. 1450, 1641 (1985). In Hearn v. Rhay, supra, the court applied a tri-part test to determine if the attorney-client privilege can be waived with respect to pleaded matters when defendants claimed they acted in good faith and without malice. The Hearn test includes three criteria for utilizing the placing-at-issue waiver: the privilege-holder must (1) assert the privilege through some affirmative act which puts the protected information at issue; (2) through this act the asserting party puts the information at issue and renders it relevant to the action; and (3) by applying the privilege the opposing party would be denied access to privileged matter that is vital to the opposing party's defense. Hearn v. Rhay, supra, 68 F.R.D. at 581. Additionally, the court in United States v. Exxon Corporation, supra, used the Hearn test to hold that the oil company had waived its attorney-client privilege in an action to recoup overcharges in the sale of oil when Exxon raised the defense of good-faith reliance on the Department of Energy's representations. In Exxon, as in the instant case, the purpose of the discovery was to deter,mine facts which required delving into the subjective intent of the parties, and, as well, the attorney-client privilege was used as a shield to this discovery.

"* * * Thus, the only way to assess the validity of Exxon's affirmative defenses, voluntarily injected into this dispute, is to investigate attorney-client communications where Exxon's interpretation of various DOE policies and directives was established and where Exxon expressed its intentions regarding compliance with those policies and directives. There is no other reasonable way for plaintiff to explore Exxon's corporate state of mind, a consideration now central to this suit." Exxon v. United States, supra, 94 F.R.D. at 249.

The situation in the case at bar is especially suited to the Hearn analysis because at the hear of the Hearn court's decision was the manifest unfairness of permitting a party to both assert information through some affirmative act for his own benefit, and to deny his opponent access to the very evidence that might refute or allow defense of this information. Hearn v. Rhay, supra, 68 F.R.D. at 581. Similarly, the case at bar presents a scenario where such manifest injustice did occur from such a practice.

An application of this Hearn analysis does not necessarily open up a Pandora's box of everything becoming unprivileged.

"The anticipatory waiver theory concerns itself solely with the decision, whether by plaintiff or defendant, to commit to a course of action that would require the disclosure of privileged material. A defendant who answers a complaint with a general denial has not committed himself to such a course, because he bears no initial burden of going forward with evidence. Pleading an affirmative defense, however, if the defense can be established *only* with privileged evidence, will waive the defendant's privilege. The critical choice being exercised by the pleader is not whether to sue or defend, but whether to do so with privileged evidence. The decision to use privileged evidence should create a waiver of the evidence so disclosed and of any other evidence with regard to the same subject matter." 98 Harv. L. Rev. at 1643.

Sinclair asserted through five separate defenses that it had no malice when it published the letter. Consequently, by asserting this view in

its answer to the amended complaint rather than a general denial, under the Hearn analysis the attorney-client privilege was waived, and the material became discoverable.

Additionally, there is great injustice in permitting the defendants to collusively hide the information and in effect deprive a court of the information it needs to avoid improperly terminating the case by summary judgment. A litigant should be permitted to diligently pursue discovery for the court to have the necessary information to effectuate a valid summary-judgment disposition.

The rule of necessity should be utilized to develop and reveal the information through discovery needed for the initial review by a court in a summary judgment proceeding.

> "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." Williams v. Florida, 399 U.S. 78, 82, 90 S.Ct. 1893, 26 L.Ed.2d 445 (1970).

Without this necessary information, the court is effectively presented with only one hand to examine, and the use of the privilege under this joint representation arrangement results in summary-judgment disposition becoming hardly more than a sham.

Unsettled by review of the comprehensive briefing and detailed record, and without defined opinion about what trial results might be, it is my conclusion that at least as now presented, this activated and anguished litigation should not have been concluded by summary judgment. Consequently, I dissent.

APPENDIX B

THE DISTRICT COURT OF THF SECOND JUDICIAL DISTRLCT

OF THE STATE OF WYOMING IN AND FOR
CARBON COUNTY

Civil Action No. 85C-67

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, JOHN E. FOLEY, and JOSEPH M. MISBRENER,

Plaintiffs,

vs.

SINCLAIR OIL CORPORATION, a Wyoming and Delaware corporation, EARL HOLDING, individually and as Director and Officer of Sinclair Oil Corporation, J.R. McINTYRE, individually and as refinery Manager and employee of Sinclair Oil Corporation, and JOHN DOE(s), whether singular or plural, that individual or those individuals who participated in the republishing of the defamatory statement,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled matter coming on for hearing on 16 May 1986 before the Court upon the Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, the Plaintiffs appearing by and through their attorneys, Richard Rideout, of Vines, Rideout, Gusea & White of Cheyenne and John W. McKendree and Donald J. Mares of Denver, Colorado, and the Defendants appearing by and through their attorneys, Dan S. Bushnell of Kirton, McConkie & Bushnell, Salt Lake City, Utah and James L. Applegate of Hirst & Applegate,

Cheyenne, and the Court having heard the arguments of counsel, having reviewed the motions, briefs, depositions, affidavits, and exhibits filed in connection therewith by the parties, and being fully advised in the premises, makes the following findings of fact and conclusions of law and judgment.

FINDINGS OF FACT

1. This is a civil action arising out of alleged defamatory statements contained in a letter by Dorothy A. Paiacios, former international Representative of Oil, Chemical and Atomic Workers International Union, submitted to the employees of Sinclair Oil Corporation, represented by OCAWIU immediately prior to a decertification election concerning the continuation of OCAW as exclusive bargaining agent for the Sinclair, Wyoming, refinery employees.

2. Sinclair Oil Corporation is a corporation authorized to do business in tbe state of Wyoming, which owns and operates Sinclair Refinery at Sinclair, Wyoming. Defendant Earl Holding is an officer and director of Sinclair Oil Corporation, and Defendant J. R McIntire is the manager of the Sinclair Refinery at Sinclair, Wyoming.

Plaintiff Joseph M. Misbrener is International President of OCAW and John E. Foley is District No. I (California) Director of the International Union (OCAW).

3. Defendant McIntire was chief negotiator for Sinclair in collective bargaining negotiations with the OCAWIU and its Local 2-259, and was attempting to work, out the terms of an agreement to succeed the agreement between Sinclair and OCAWIU which expired on January 7, 1983.

4. Negotiations between Sinclair and the OCAWIU continued up until the expiration date of the agreement on January 7, 1983.

5. The parties were unable to agree and the OCAWIU filed unfair labor practice charges with the National Labor Relations Board (NLRB) against Sinclair and Sinclair filed unfair labor practice charges

with the NLRB against the OCAWIU. Additional unfair labor practice charges and counter-charges were also subsequently filed by OCAWIU and Sinclair. The result was that the NLRB dismissed all but one of the OCAWIU's charges against Sinclair or the Union withdrew them, but issued complaints on the charges filed by Sinclair against the OCAWIU, which the OCAWIU subsequently settled. Holding had had unhappy experiences and disputes with OCAW at the Sinclair plant in Wyoming. McIntire was personally aware of several of these vexatious incidents at the Sinclair plant.

6. In January 1983, Dorothy A. Palacios was an International Representative for OCAWIU in California, District 1, under the supervision of John E. Foley. She was given a copy of an OCAWIU telegram dated January 28, 1953 requesting an investigation of Robert Earl Holding and his businesses. She conducted such an investigation and made a written report to Joseph M. Misbrener on February 7, 1983. In August 1983 Palacios filed an harassment grievance against her employer, OCAWIU, and on 20 September 1983 she was terminated from her employment by OCAWIU. She then filed a grievance against OCAWIU, charges with the National Labor Relations Board, and with the Equal Employment Opportunity Commission protesting her discharge by OCAWIU. Thereafter, she telephoned both Mr. Holding's daughter and Mr. Holding .himself apologizing for conducting the investigation into Holding's background and seeking his assistance in finding an attorney to represent her in her own grievance cases against OCAWIU. On January 10, 1984 and on February 19, 1984, Palacios wrote letters to Holding confirming these telephone calls. Palacios' controversy with OCAWIU was favorably settled by her in October 1984.

7. On or before February 14, 1984, some employees at the Sinclair refinery petitioned the NLRB to conduct an election for the Sinclair employees to decide whether they wanted to decertify the OCAWIU and its Local 2-259 as the exclusive bargaining representive of the Sinclair refinery employees. The employees voted 112 to 27 to decertify the OCAWIU and its Local 2-259. Neither the OCAWIU nor its Local 2-259 filed objections to the election with the NLRB to overturn the results of the election, and specifically, no objections were

filed alleging any of the Sinclair's campaign materials were false or misleading. The NLRB issued its Certification of Results on May 4, 1984.

8. Upon learning that a petition for a decertification election had been filed by the employees of Sinclair Oil Corporation, Palacios authored the letter in controrversy here and caused it to be forwarded, as well as copies of the January 28, 1983 OCAWIU telegram and of her February 7, 1983 investigation report, to Holding, chief executive officer of Sinclair.

9. Prior to the election to decertify the OCAWIU on April 26, 1984, Defendants Holding and McIntire reviewed the letter from Dorothy Palacios, a copy of a telegram from Dean Alexander to Jack Foley, and a copy of a report from Dorothy Palacios to Joseph Misbrener concerning the results of Palacios' investigation of Mr. Holding and his family and businesses. Holding related to McIntire the substance of his and his daughter's earlier telephone calls from Palacios and his previous experience and disputes with OCAWIU at the Sinclair plant.

10. Based upon their previous experiences with OCAWIU, on the information contained in the Palacios telephone calls, the OCAWIU telegram and the Palacios report to Misbrener, Defendants Holding and McIntire did not believe nor have any reason to believe that the statements made by Palacios in her letter to Sinclair's employees were false. Furthermore, they did not have then nor do they have now, knowledge that any of the facts contained in the Palacios' letter to Sinclair's employees were false. They believed the statements contained in the letter were true and still believe they were true to this day. They neither knew nor were aware of any facts which casued them to believe any part or, parts of the Palacios letter were false. Defendants Holding and McIntire were never aware of any denial of the truth of such statements and comments attributed to Plaintiffs by Palacios, save and except for the allegations contained in Plaintiffs' complaint. Therefore, Defendants Holding and McIntire decided to distribute the Palacios letter to Sinclair's refinery employees and to the Rawlins Daily Times which confirmed the contents of the

Palacios letter with Palacios herself by telephone.

11. Plaintiffs have failed to demonstrate with convincing clarity that Defendants acted with actual malice.

12. There is no factual support to show that Defendants Sinclair Oil, Holding, or McIntire had knowledge of falsity of any part of the Palacios letter or that they distributed the letter to others with any reckless disregard of the truth of the letter. No inferential or direct showing of Defendants' knowledge of falsity or substantial belief in the falsity of the Palacios letter's statements have been provided by any material or competent evidence provided by Plaintiffs.

At no time was there a "subjective belief" held by Defendants Holding or McIntire that any fact statements in the Palacios' letter were false nor did the Defendants have serious doubts as to the truth of the statements contained in the letter. The statements by Plaintiffs lack the necessary materiality and convincing clarity to constitute the genuine issue of material facts or inference therefrom.

13. Both, Plaintiffs Foley and Misbrener acknowledge that neither knew of any act or statement on the part of Sinclair, Holding or McIntire which did indicate malice or recklessness on the part of the Defendants other than circulation of the Palacios letter.

14. The vast majority of the Palacios letter consists of expressions of opinion concerning matters of public interest, are fair comments, statements of opinion, or raise rhetorical questions. These comments on the letter are analyzed in greater detail in the 3 July 1986 opinion letter of Honorable Robert A. Hill, District Judge, a copy of which is attached hereto and made a part hereof by reference.

CONCLUSIONS OF LAW

1. There being no genuine issue as to any material facts, Defendants are entitled to judgment.

2. Expression of opinion in "heated labor disputes" is a form of

constitutionally protected criticism, therefore the allegedly libelous statement in the Palacios letter are not defamatory as a matter of law.

3. The vast majority of the Palacios letter consists of expressions of opinion concerning matters of public interest, are fair comments, statements of opinion or raise rhetorical questions. These are not libelous as a matter of law.

4. Article I, Section 20 of tbe Constitution of the State of Wyoming does not preclude final disposition of a libel case before trial.

5. Defendants are entitled to the entry of Judgment in accord with these Findings of Fact and Conclusions of Law together with their costs of this action.

JUDGMENT

NOW THEREFORE, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss or in the Alternative for Summary Judgment should be, and the same hereby is, granted, Summary Judgment being hereby entered in favor of Defendants and against Plaintiffs on Plaintiffs' Complaint;

IT IS FURTHER ORDERED that Defendants have their costs of this action to be taxed by tbe Clerk.

Dated: 28, July 1986.

ROBERT A. HILL
District Judge

Approved as to form:

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APPENDIX C

July 3, 1986

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RE: OCAW, Foley and Misbrener vs.
Sinclair Oil Corp., Holding, McIntire et al.
Civil Action No. 85C-67

Gentlemen:

Upon consideration of the voluminous memoranda, depositions, and exhibits submitted upon the defendants' motion for summary judgment, this Court will grant the motion.

The subject of this litigation arises out of the alleged defamations contained in a letter by Dorothy A. Palacios, former International Representative of Oil, Chemical and Automic [sic] Workers International Union (hereafter OCAWIU), submitted to Employees of Sinclair

Oil represented by OCAW, two days prior to the decertification of OCAW as exclusive bargaining agent. (See Appendix I.)

Defendants have filed their motion for summary judgment pursuant to Rule 56 of W.R.C.P., alleging that "there is no genuine issue as to any material facts and that the defendants are entitled to judgment as a matter of law." This Court is mindful that, "It is not the purpose of such a motion to decide the facts but to determine if any real issue exists." *Kover* v. *Hufsmith* 497 P.2d 908 (Wyo. 1972). There being no genuine issue as to any material fact, the defendants are entitled to judgment.

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE WITH "CONVINCING CLARITY," THAT DEFENDANTS ACTED WITH "ACTUAL MALICE," AND THEREFORE SUMMARY JUDGMENT IS MANDATED WHERE THE ACTION IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

A. Actual Malice Standard

Preeminent in libel actions in the context of labor disputes is *Linn* v. *United Plant Guard Workers of America*, 383 U.S. 53, 94 S.Ct. 2770, 15 L.Ed.2d 582 (1966). In Linn, the Court held that in an action for libel based on defamatory statements made during a labor dispute, the plaintiff has the burden to show that the alleged libelous statements were made with malice. To the extent that false and defamatory statements are not made with "actual malice", state courts must defer to the exclusive competence of the National Labor Relations Board, "in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of Section 7 or the prohibitions of Section 8 of the amended National Labor Relations Act . . .". (29 U.S.C. Sections 157, 158) *Linn* v. *United Plant Guard Workers*, supra, 15 L.Ed.2d at 588.

> It is clear that the National Labor Relations Board does not "police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such

matters, and to opposing parties the task of correcting inaccurate and untruthful statements." *Stewart-Warner Corp.* 102 NLRB 1153, 1158 (1953), cited in *Linn* v. *United Plant Guard Workers*, supra at 588 L.Ed.2d. Although the National Labor Relations Board has been held to tolerate "intemperate, abusive and inaccurate statements" during the course of a labor dispute, the National Labor Relations Act does not preempt intentionally defamatory material *known to be* false. "In such case the one issuing such material forfeits his protection under the Act." *Wells Manufacturing Co.* 137 NLRB 1317, 1319 (1962).

Under the "actual malice" test articulated in *New York Times Co.* v. *Sullivan* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), "actual malice" is defined as "libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false." Thus, an overriding state interest attaches, "in protecting its residents from malicious libels . . .". *Linn*, supra, 15 L.Ed.2d at 589.

In *Old Dominion Branch No. 496 AFL-CIO*, et al. v. *Austin*, 418 U.S. 264, 41 L.Ed.2d 745, 94 S.Ct. 2770 (1974), the Court reaffirmed the Linn standard, that "libel actions under state law were preempted by the federal labor laws to the extent that the State sought to make actionable defamatory statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth." *Old Dominion*, supra, 41 L.Ed.2d at 755. *Linn*, supra and *Old Dominion*, supra, recognize that federal law gives a union license to use "intemperate, abusive or insulting language without fear of restraint or penalty", if the union believes such rhetoric to be an effective means to make its point. This protection applies with equal force to statements made by or circulated by management under the National Labor Relations Act.

In the instant case, there is no factual support of knowledge of falsity or reckless disregard for the truth. In providing a background of prior labor-management unrest, both plaintiffs and defendants provide an extensive documentation of the ill will that

preceded the present litigation. This background is collateral to the issue of the knowledge of defendants of the falsity of the Palacios letter or the reckless disregard of the truth of that letter.

It is clear that the "actual malice" standard demands a higher requirement of proof than plaintiffs are able to show, demanding the plaintiffs to demonstrate that defendants had a "high degree of awareness of probable falsity;" *Garrison* vs. *Louisiana, 279 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125, 133 (1964), and "in fact entertained serious doubts as to the truth of his publication." St. Amant* v. *Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262, 267 (1968).

Citing *St. Amant* v. *Thompson*, supra, the Wyoming Supreme Court stated that "(r)eckless disregard...connotes that '(t)here must be sufficient evidence as to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" *Adams* v. *Frontier Broadcasting Co.* 555 P.2d 556, 564 (Wyo. 1976). In *McMurray* v. *Howard Publications, Inc.* 612 P.2d 14, 18 (Wyo. 1980) the Wyoming Court reaffirmed this position:

> "'knowledge of falsity' involves a *subjective* awareness of the falsity of the statements and 'reckless disregard' involves sufficient evidence to permit an inference that the defendant must have, in fact, subjectively entertained *serious doubts* as to the truth of the statements." (Emphasis added.)

Plaintiffs contend, pursuant to depositions of Misbrener, pp. 68-82, and Foley, pp. 115-120, that material issues of fact remain, where Misbrener and Foley deny telling Palacios, "Dig up all the dirt you can find on this guy (Holding). Joe needs to find something on him . . . they're having some trouble with Sinclair." It is immaterial whether Misbrener and Foley deny making such statements. Only evidence showing defendants had actual knowledge of the falsity or a substantial belief in the falsity of

the Palacios letter are pertinent to the limited inquiry of "actual malice."

In a like fashion, the credibility of witnesses does not become material in summary disposition of libel action under the actual malice test unless there is direct or inferential evidence of defendants knowledge of the falsity of material. In the present case, an inferential or direct showing of defendants knowledge has not been provided.

Plaintiffs further contend that acceptance of a third party's statement, and the publication of that statement without investigation, may constitute publication with actual malice. Dispositive of this issue is *Adams* v. *Frontier Broadcasting Co.*, 555 P.2d 565 (Wyo. 1976) where the Wyoming Court held on the basis of *New York Times* v. *Sullivan*, supra, that "simply depriving oneself of the opportunity to evaluate the information and form a conclusion with respect to falsity or doubt as to truth does not amount to reckless disregard under the Times rule." (Emphasis added.) *Adams* v. *Frontier Broadcasting Co.*, supra, at 565. Failure to investigate is..."constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *New York Times* v. *Sullivan*, supra, at 711 L.Ed.2d, *Linn* v. *United Plant Guard Workers* and *Old Dominion Branch No. 496* v. *Austin*, depend by analogy upon *New York Times* v. *Sullivan*.

Plaintiffs contend that to require direct evidence of actual knowledge or reckless disregard, "when all such direct evidence has been withheld by defendants due to the attorney client privilege, would impose a potentially impossible burden on Plaintiffs." The rule as to privileged communications between attorney and client applies notwithstanding the manner in which it is sought to be placed into evidence, whether by direct examination, cross examination, or indirectly. Section 81 Am.Jur.2d Section 194 (1976). Therefore, it is immaterial to summary disposition that privileged communications are excluded at the pre-trial stage of litigation where those communications must likewise be excluded from evidence at trial.

Plaintiffs contend that evidence of hostility and ill will on the part of a publisher of defamatory material, is among the most important evidence a defamed party can present in meeting its burden of actual malice. Citing *Buckley Newspapers Corp.* v. *Harde* 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967) and *Rosenblatt* v. *Baer* 383 U.S. 75, 84, 86 S.Ct. 669, 15 L.Ed.2D 597 (1966), the Wyoming Supreme Court makes it clear that "bad or corrupt motives, spite, hostility, ill will or deliberate intention to harm *are not material* with respect to the application of the definition of actual malice set forth in *New York Times Co.* v. *Sullivan*." *Adams* v. *Frontier Broadcasting Company* 555 P.2d 556 (Wyo. 1976). Again, such issues are merely peripheral to the limited question of defendants knowledge of the falsity of the material republished.

B. Summary Judgment Standard

The criterion by which the Wyoming Supreme Court measures the efficacy of a motion for summary judgment in action for libel as promulgated in *MacGuire* v. *Harriscope Broadcasting*, 612 P.2d 830 (Wyo. 1980) provides:

> "We hold that the standard of *convincing clarity* requires the plaintiffs to structure the issues of material fact by conflicting evidence. They may not rely simply on conflicting inference." *MacGuire* v. *Harriscope Broadcasting Co.*, supra, at 839. (Emphasis added.)

The standard of convincing clarity, as applied to test plaintiffs motion for summary judgment under *New York Times* v. *Sullivan*, requires proof "that is clear, precise and indubitable or unmistakable and free from serious and substantial doubt." *MacGuire* v. *Harriscope Broadcasting Co.*, supra, at 839. It is that kind of proof "which would persuade a trier of fact that the truth of the contestation is highly probable." Manuel v. Fort Collins Newspapers, Inc., 599 P.2d at 933.

The Palacios letter, published in connection with a heated labor dispute, had as its singular purpose to persuade the laboring rank and file to a viewpoint favorable of decertification. See *Gregory v. McDonnell Douglas Corp.*, 552 P.2d 425 (Cal. 1976). Appraisal of depositions, affidavits and briefs and exhibits intimate that at no time was there a "subjective belief" held by defendant Holding or defendant McIntire that the Palacios letter was false nor did the defendants have serious doubts as to the truth of statements contained in that letter. Statements by plaintiffs at variance with this conclusion are peripheral to any subjective awareness of falsity on the part of defendants and, therefore, lack the necessary materiality and "convincing clarity" to constitute a genuine issue of material fact or inference thereof.

It is dispositive that both plaintiffs Foley and Misbrener acknowledged that neither knew of any act or statement on the part of Sinclair, Holding, or McIntire which would indicate malice or recklessness on the part of defendants, other than circulation of the Palacios letter. (Foley deposition, p. 77, 80-82, 103-108, 175-178; Misbrener deposition, Volume I. p. 168-169):

> Q: "Now is there any specific act of malice or recklessness or wanton conduct that you think were committed by Sinclair or by Mr. Holding or by Mr. McIntire other than circulation of the two letters?
>
> (Objection omitted.)
>
> A: "I know of no other action that attaches to me personally, no . . . "

Federal labor policy underlies the more restrictive treatment of state court libel and slander suits within the labor context where the Court recognizes that unconfined libel actions could easily interfere with federal labor policy:

> "We acknowledge that the enactment of Section 8(c) manifests a Congressional interest to encourage free debate on issues dividing labor and management...cases involving speech are to be considered against a backdrop of a profound commitment to the principle that debate...should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks. (Citations omitted). Such considerations weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." *Linn* v. *United Plant Guard Workers* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582.

Recognizing clearly the possibility for defamation to occur in a union decertification election, commitment to "uninhibited, robust and wide-open" debate must, in balance, outweigh the common law right of an individual against libel. As was said in *Adams* v. *Frontier Broadcasting Co.*, 555 P.2d at 556:

> "The best procedural protection for freedom of speech, which the *New York Times Co.*, v. *Sullivan*, supra, standard is designed to protect, is found in the remedy of summary judgment which the courts have utilized freely in such cases. *The chilling effect of litigation* and the inconvenience frequently have led courts to conclude that summary judgment is the most appropriate remedy in an instance such as this in order to minimize that chilling effect as much as possible. (Citations omitted.) 555 P.2d at 566.

II. EXPRESSION OF OPINION IN "HEATED LABOR DISPUTE" IS A FORM OF CONSTITUTIONALLY PROTECTED CRITICISM; THEREFORE ALLEGEDLY LIBELOUS STATEMENTS ARE NOT DEFAMATORY AS A MATTER OF LAW.

Where the expression of opinion concerns a matter of public interest, such opinion is a form of constitutionally privileged criticism, customarily known as "fair comment." The privilege of fair comment applies only to an expression of opinion and not to a false statement of fact. Restatement (Second) Tort Section 566 (1977). "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on competition of other ideas. But there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.* 418 U.S. at 339-340 (1974)."

This privilege extends to an expression of opinion in the labor dispute context. The privilege exists as long as the opinion is the actual opinion of the critic and is not made solely for the purpose of causing harm, regardless of whether the opinion was reasonable or not.

> "The *sine qua non* of recovery for defamation in a labor dispute under *Linn* is the existence of a falsehood...before the test of reckless or knowing falsity can be met, there must be a false statement of fact." (Letter *Carriers* v. *Austin* 418 U.S. 254, 270-273, 95 S.Ct. 2770, 41 L.Ed.2d 745. See also *Gertz* v. *Robert Welch, Inc.* 418 U.S. 339-340, 41 L.Ed.2d at 805.

The distinction between actionable fact and protected opinion is a difficult one. Recognizing this difficulty, the Colorado Supreme Court has said, "allegedly defamatory language must be examined in the *context* in which it is uttered. It would not be possible for us to establish a hard and fast rule which could govern every situation. *Protecting the important competing interests of free speech* and reputation requires a flexible approach anchored in the context of each cause of action." *Burns* v. *McGraw-Hill Broadcasting Co., Inc.* 659 P.2d at 360 (Colo. 1983). (Emphasis added.) Where the Palacios letter was republished during a heated decertification election, it is significant to consider the policy set forth in

Linn v. *Plant Guard Workers*, supra, of encouraging uninhibited and free debate on issues dividing labor and management.

> "Where potentially defamatory statements are published in a public debate, a *heated labor dispute*, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." *Gregory* v. *McDonnell Douglas Corporation*, 552 P.2d 425 (Cal. 1976). (Emphasis added.)

Gregory v. *McDonnell Douglas Corp.*, supra, within the heated labor dispute setting provides a slightly higher degree of protection than is mandated under *Letter Carriers* v. *Austin*, supra, and *Gertz* v. *Robert Welch, Inc.*, supra. Gregory, recognizes, "that statements made in the context of a labor dispute which on their face resemble statements of fact, may, depending on the circumstances, be treated as statements of opinion *not subject to an action for libel*." *Gregory* v. *McDonnell Douglas Corp.* 552 P.2d at 428. (Emphasis added.) Labor disputes, normally involve considerable differences of opinion and vehement adherence to one side or another; therefore courts have espoused a necessarily broad area of discussion free of civil responsibility as an indispensable concomitant of the controversy consistent with the dictates of *Linn* v. *Plant Guard Workers*, supra.

"A simple expression of opinion based on disclosed or assumed nondefamatory facts is not of itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." Restatement (Second) Torts Section 566 at 173. Palacios accurately identified herself in the second paragraph of her letter to Sinclair employees as a former employee of OCAWIU. Additionally, Palacios correctly discloses that a discrimination/harassment grievance was filed by her against

OCAW administration, prompted by her belief and *based on her own thinking*, that she had experienced:

> "...personally, flagrant violation of my rights by OCAW as a union member; as a professional employee of OCAW; as a dues payer to an OCAW local (also, the staff union, IRCU); and as a U.S.A. Citizen." (Exhibit A)

Palacios was also under the opinion that as a result of the filing of her discrimination/harassment grievance against OCAW administration, that..."I was terminated from my employment one month later." (Exhibit A)

The determination of whether a statement constitutes actionable fact or constitutionally protected opinion lies in the effect of the statement upon the recipient of the communication. It is significant that Palacios' letter was intended as a medium of persuasion. Even apparent statements of fact may assume the character of statements of opinion, and thus are privileged, when made in public debate, a heated labor dispute, or in other circumstances in which an "audience may anticipate efforts by the parties to persuade others to their position by use of epithets, fiery rhetoric or hyperbole..." Gregory, supra, 552 P.2d at 428. See also *Scott* v. *McDonnell Douglas Corp.*, 37 DCal. App. 3d 277, 112 Cal.Rptr. 609 (1974) *Taylor* v. *Lewis*, 22 P.2d 569 (1933). Accordingly, Palacios' remaining statements on the first page of her letter must also be accorded the standing of constitutionally protected opinion within the context of heated labor dispute:

> "I found this 'assignment' distasteful, insulting and offensive since I considered myself a qualified organizer and not a vulgar spy for those who must ply their trade by trashy, unethical practices...nor did I aspire to be a 'digger of dirt.'"

Palacios carefully frames the above statement that she "*found*"

the assignment given her distasteful, insulting and offensive. Where the language of the statement is "cautiously phrased in terms of apparency" or is of a kind typically generated in a spirited labor dispute in which the judgment, loyalties and subjective motives of the parties are reciprocally attached and defended, "the statement is less likely to be understood as a statement of fact rather than as a statement of opinion." *Information Control* v. *Genesis One Computer Corp.* 611 F.2d 781 (1980), citing Gregory, supra, 552 P.2d at 429.

In an equivalent fashion, Palacios on the second page states her opinion, that the assignment given her "was an action intended, undeservedly, to malign your employer (Holding)..." Further, Palacios states that she;

> "...felt the need to apologize for OCAW. The leadership has abdicated any sense of decency in their desperation to keep their political boat afloat."

As preface to the above statement, Palacios asserts that she was "forced to reason" about the assignment she undertook and the conclusions she drew therefrom. Common sense dictates that the outgrowth of ones "reasoning" can only produce opinion.

The above quoted statements do not impute crimes or dishonesty to plaintiffs. Rather, they contain opinions that plaintiffs are not performing their duties competently and are not providing for the best interests of the union membership. "Publications otherwise protected under the First Amendment do not lose their protection because they contain statements which attribute improper motives to a public officer or to an active participant in a labor dispute." *Gregory* v. *McDonnell Douglas Corp.*, supra, at 430. Interestingly, the Palacios letter contains similar statements to those which were held constitutionally protected under Gregory, supra:

> "Apparently there were some internal politics within Local 148 and other areas of the UAW which certain individuals were using to seek personal gain and political prestige rather than to serve the best interests of the members they were supposed to represent." *Gregory* v. *McDonnell Douglas Corporation*, 552 P.2d at 427.

Such statement held to be constitutionally protected in *Gregory* is indistinguishable from Palacios' statement that "The (OCAW) leadership has abdicated any sense of decency in their desperation to keep their political boat afloat." (Exhibit A)

Palacios on page two of her letter raises *rhetorical questions* concerning the intent of union leadership in assigning her to "dig dirt":

> "Why do OCAW so-called leaders need to 'dig dirt'? Were they planning blackmail, presuming to call it 'negotiations'? Was this the intent of such 'investigation'? *I do not know.*"

Plaintiffs' claim is similar to that rejected by the U.S. Supreme Court in *Greenbelt Cooperative Publishing Assn.* v. *Bresler* 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970). In Greenbelt defendant characterized the position of plaintiff, a public figure, in certain negotiations as "blackmail." Recovery was sought on the theory that defendant knew that no criminal offense had been committed. The court held that the use of the word "blackmail," as in the present case, was used in a loose, figurative sense in forming opinion as to a bargaining position taken during negotiations and not charging the crime of blackmail.

> "No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must

> have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." 26 L.Ed.2d at 15.

It is similarly impossible to believe that any readers of the Palacios letter would have understood the letter to be charging plaintiffs with the criminal offense of blackmail. Palacios did nothing more than ask rhetorical questions based in opinion. She candidly acknowledges that she did not know the answers to her own questions:

> "Was (blackmail) the intent of such 'investigation'? *I do not know.*"

Expressions of such an opinion, even in the most pejorative terms, are protected under federal labor law. *National Association Letter Carriers* v. *Austin* 41 L.Ed.2d at 762. In *Rinsley* v. *Brandt* 700 F.2d 1304 (10th Cir. 1983), a false light privacy action was brought by a psychiatrist against an author where the author wrote: "what does it take to put a stop to such a man? How many more children must die?" The court held that "these rhetorical questions...are severe criticisms of Rinsley (psychiatrist) and his methods. But they are exactly that - exaggerated expressions of criticism. They are the type of statement that our society, interested in free and heated debate about matters of social concern, has chosen to protect" *Rinsley* v. *Brandt* 700 F.2d 1309 (1983).

Plaintiffs contend that Article I, Section 20 of the Constitution of the State of Wyoming requires that the jury should determine whether alleged defamatory statements constitute fact or opinion. Article I, Section 20 provides in pertinent part:

> "...and in all trials for libel, both civil and criminal, the truth when published with good intent and (for) justifiable ends, shall be a sufficient defense, the jury having the right to determine the fact and the law under direction of the Court."

Section 20 pertains only to "all trials for libel," and does not preclude summary disposition before trial. If plaintiffs' contentions are meritorious, a substantial oversight has been committed in those cases affirming the grant of summary judgment in action for libel. *Adams* v. *Harriscope Broadcasting Co.* 555 P.2d 556 (Wyo. 1976), *MacGuire* v. *Harriscope Broadcasting Co.* 612 P.2d 830 (Wyo. 1980), *McMurry* v. *Howard Publications, Inc.* 612 P.2d 14 (Wyo. 1980). An allegedly defamatory statement becomes a question of law when determining its content as fact or opinion. *Gregory* v. *McDonnell Douglas Corp.* 552 P.2d at 428, *Information Control* v. *Genesis One Computer Corp.* 611 F.2d at 783, *Greenbelt Cooperative Publishing Assn* v. *Bresler* 398 U.S. 6, 13-15, 90 S.Ct. 1537, 1542-43, 26 L.Ed.2d 6 (1970).

Palacios states in paragraph three, page one of her letter, that she was told by plaintiff Foley, District One Director of OCAW, to..."Dig up all the dirt you can find on this guy (Holding). Joe needs to get something on him...they're having some trouble with Sinclair." (Exhibit A) Palacios' statement lends itself to a definite showing of falsity or truthfulness and therefore, constitutes a statement of fact. *Lyons* v. *New Wave Media, Inc.* 453 N.E. at 458 (Mass. 1983).

However, the inquiry is not ended with the determination that the above quoted statement is a statement of fact. Plaintiffs assert under Rule 56(c) W.R.C.P. that a genuine issue of material fact exists in plaintiff Foley and plaintiff Misbrener's denial that such statement was ever made to Palacios. Palacios has attested to the accuracy and truthfulness of the quotation in her deposition. (Affidavits of John E. Foley and Joseph Misbrener; Deposition of John E. Foley p. 133-140; Deposition of Joseph Misbrener, p. 68-82; Deposition of Dorothy Palacios Vol. I. p. 67-68). Determinative of this issue is Rule 56(e) W.R.C.P., which states:

> "Where a motion for summary judgment is made and supported as provided in this rule an adverse party *may not rest upon the mere allegations* or *denials of his pleading*, but his response, by

> affidavits or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial*. If he does not so respond summary judgment if appropriate, shall be entered against him." (Emphasis added)

Rule 56(c) and Wyoming cases impose a burden of demonstrating to the court the conflict as to material facts by a showing of "specific facts" that a genuine issue is present for trial. Rule 56(e) W.R.C.P. Where plaintiffs have failed to set forth *any* specific corroborative evidence, plaintiffs' conclusionary denials of the accuracy of the quotation are inadequate (1) to bring their affidavits and depositions into competence, or (2) to create a genuine issue of dispute. "If categorical assertions of ultimate facts without supporting evidence could be used to defeat summary judgment this procedure would have no viability and would be contrary to the philosophy of Rule 56(e), W.R.C.P., and *Clouser* v. *Spanion Ford, Inc., Wyo.* 552 P.2d 1360, 1363." *Maxted* v. *Pacific Car Foundry Company*, 527 P.2d at 834 (Wyo. 1974). Further, it is clear that under this provision, "statements in affidavits as to opinion, belief, or conclusions of law are of no effect;" *Cook Ford Foley, Inc.* v. *Benson* 392 P.2d at 309 (Wyo. 1964) citing 3 barron and Holtzoff, Federal Practice and Procedure, Ca. 11, Section 1237 pp. 164-167, nor may a party "rely upon conclusions nor can they be employed in disposing of a motion for summary judgment" *Maxted* v. *Pacific Car Foundry Company*, supra, at 834. (Emphasis added.)

I respectfully request that counsel for defendants prepare the necessary order with sufficient findings of fact and conclusions of law, then submit it to counsel for the plaintiffs for approval as to form. When I receive it, I will sign it.

Respectfully submitted,

Robert A. Hill
District Judge

TO: OCAW-REPRESENTED EMPLOYEES OF SINCLAIR OIL

It has come to my attention that you are preparing for an election on April 26, 1984. *There are some facts you should know.*

For nearly 12 years, I had been an International Representative for OCAW; I wish that I could praise the union, but, sadly, I cannot. Having experienced, personally, flagrant violation of my rights by OCAW as a union member; as a professional employee of OCAW; as a dues payer to an OCAW Local (also, the Staff Union, IRCU); and as a USA citizen, I was obliged to file a discrimination/harassment grievance against the OCAW Administration which so angered them that I was terminated from my employment one month later. For public record, both EEOC and NLRB charges have been filed against OCAW. This, of course, is my personal problem. *The subject of serious concern to you follows*:

One of the assignments I was given as an International Representative for OCAW was to research records and background of your employer, Robert Earl Holding. This assignment came to me from Joe Misbrener, now International President of OCAW, through his Assistant, Dean Alexander, to District 1 Director Jack Foley. Foley told me (quote verbatim)..."Dig up all the dirt you can find on this guy. Joe needs to get something on him ...they're having some trouble with Sinclair."

I found this 'assignment' distasteful, insulting and offensive since I considered myself a qualified organizer and not a vulgar spy for those who must ply their trade by trashy, unethical practices ...nor did I aspire to be a 'digger of dirt'. However, I admit that I rationalized that, after all, I was accepting my salary and was obliged to carry out the assignment as instructed by my employer. I performed the investigation with care and extreme diligence. Guess what?

THE INVESTIGATION REVEALED ABSOLUTELY NOTHING EITHER BAD OR EVEN REMOTELY UNSAVORY ABOUT MR. HOLDING HOLDING! TO THE CONTRARY...I FOUND ONLY VERY GOOD REPORTS ABOUT HIM!

OCAW must have been displeased by this fact because I never had *one word* from any of them *nor even one comment* regarding the 12-page report I sent to Misbrener via certified mail. I received only the returned receipt showing proof of delivery.

My investigation led to acquaintance with many of Mr. Holding's employees. When I, tactfully, led the conversation to the subject of the union, I was told by the employees that they were not sorry for having decertified the union two years earlier. Admittedly, I was surprised to hear this from the employees.

They spoke of Mr. Holding and his family with warm enthusiasm and genuine sincerity. They assured me that Mr. Holding was a man of integrity whose word was as iron-clad, as binding, as any union contractany union contract!

Neither could I find, though I searched, any employee who suffered any loss as a result of eliminating the union. That these employees so respected, even revered, their employer aroused my curiosity. They had made it very clear to me that they were not about to re-organize with the union...to turn their backs on an employer who treated them well ...even after two years of having been without a union.

Released from my employment by OCAW, I am now free of any obligation to remain silent about that investigation. I could not have addressed you as I am now doing while I was still on the union's payroll. Neither, ordinarily, would I voluntarily write to a group of employees about union assignments. In this case, however, I was part of an action intended, undeservedly, to malign your employer and I want to take part in clearing the record.

That 'assignment' proved to be a turning point in my life and I was forced to reason...not rationalize...about this shabby, low affair of 'digging dirt' or 'throwing mud' to attempt to smear a gentleman of excellent character...as verified by his own workers. Was this why I had joined the union? Certainly not! Mr. Holding doesn't know me nor does he need my testimonial to any virtue he possesses; but I felt the need to apologize for OCAW. The leadership has abdicated

any sense of decency in their desperation to keep their political boat afloat.

Honest union leaders do not need to 'dig dirt' nor stoop to the foul play to which I've been exposed in the last years of my employment by OCAW. Why do OCAW so-called leaders need to 'dig dirt'? Were they planning blackmail, presuming to call it 'negotiations'? Was this the intent of such 'investigation'? I do not know. I know only this fact: while, I repeat, there was not one mark against the Holdings, THE GOOD WAS HIGHLY VISIBLE.

If I were a Sinclair employee, I'd encourage productivity for the benefit of everyone, and I'd give Mr. Holding an opportunity to work unhampered by an "dirt-seekers."

Remember, foul 'leadership' leads where you cannot afford to follow and taints all those connected to it. I used to believe that you could remain above it, stay clear of the 'mud.' Not so. Some of it always sticks to your fingers and is hard to clean off.

Good luck in your election!

Dorothy A. Palacios
Former Int'l. Rep.-OCAWIU

APPENDIX D

Civil Action No. 85C-67

THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF WYOMING IN AND FOR
CARBON COUNTY

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, JOHN E. FOLEY, and JOSEPH M. MISBRENER

Plaintiffs,

vs.

SINCLAIR OIL CORPORAITON, a Wyoming and Delaware corporation, EARL HOLDING, individually and as Director and Officer of Sinclair Oil Corporation, J. R., McIntire, individually and as Refinery Manager and employee of Sinclair Oil Corporation, and JOHN DOE(S), whether singular or plural, that individual or those individuals who participated in the republishing of the defamatory statement,

Defendants.

ORDER ON PLAINTIFF'S MOTION TO COMPEL DISCOVERY

Plaintiff's Motion to Compel Discovery and Plaintiff's Supplemental Motion to Compel were heard on 11 February 1986 by the Court, Plaintiffs appearing by their attorneys, John McKendree and Donald J. Mares and Richard Rideout, and Defendants appearing by their attorneys, James L. Applegate of Hirst & Applegate and Dan S. Bushnell of Kirton, McConkie & Bushnell, and the Court having considered the pleadings herein and the arguments of counsel, finds as follows:

The Court finds that the attorney-client privilege should be recognized, in the context of the disputed questions posed in the depositions referred to in Plaintiffs' Motion, as to actual attorney-client communications but that this privilege does not extend to foundational questions leading up to those actual cominunications and that such foundational questions identified as such by counsel for the parties in the transcript of the 11 February hearing before the Court should be answered by the various deponents. The Court further finds that there is no exception to the attorney-client privilege because of Plaintiffs' allegation of a tortious claim nor is there any implied waiver of the attorney-client privilege by the Defendants' allegations of having acted with lack of malice. The Court finds that coments made by attorney Daniel Gruender to Sinclair Oil Corporation employees Fritz, Moyle, White, Asich and Cannon immediately after Mr. Gruender's telephone conversation with OCAW organizer Ron Holloway concerning any threats to him by Mr. Holloway are not protected by the attorney-client privilege. The Court finds that the conversations which took place at Monticeto, California in April 1985 between attorney Daniel Gruender, attorney Dan S. Bushnell, Dorothy Palacios, Earl Holding and Carol Holding are not protected by the attorney-client privilege, the same having been waived by the presence of a third-party, Dorothy Palacios and that the attorney work product exclusion applies to documents and tangible things prepared in anticipation of litigation or for trial. (WRCP Rule 26(b)(3))

IT IS FURTHER ORDERED that those pending questions not agreed upon by counsel for the parties as foundational questions are hereby ruled upon as follows:

DANIEL F. GRUENDER DEPOSITION

Brief p. 43: "Q. Have you performed any services on behalf of Sinclair Oil Corporation other than in the area of what I would describe generally as the Labor Management Relations Act matters?" (Appendix A, p. 16, lns. 20-23)

RULING: OBJECTION OVERRULED

Brief p. 48: d. "Q. Did the fact that the decertification election was scheduled for Thursday, April the 26th, 1984, have anything to do with the reason why you and Mr. Ensign were present at this meeting [a meeting held with representatives of the Rawlins Daily Times, attended by, among others, this witness, on the day immediately prior to the decertification election in Sinclair, Wyoming]?" (Appendix A, p. 44, lns. 22-24, p. 45, ln. 1)

RULING: OBJECTION OVERRULLED

Brief p. 62: n. "Q. It's true, isn't it, that one of the purposes of that meeting [a meeting held on or about April 24, 1984, at the Sinclair Refinery attended by Carol Holding, Dale Ensign, this witness, Defendant McIntire, and John Goodwin, an employee of Defendant Sinclair Oil) was to discuss what to do with the Palacios' letter, Exhibit A, Pages 23 and 24 [the defamatory letter republished to the employees of the Sinclair Refinery]?" (Appendix A, p. 118, lns. 8-10)

RULING: OBJECTION OVERRULED.

Brief p. 64: o. "Q. Do you know whether or not he [an employee of Sinclair named Bradford who filed the petition for decertification resulting in the decertification election held on April 26th] was solicited by any representatives of Sinclair Oil Company to file such petition [petition for decertification of the OCAW at the Sinclair Refinery]?" (Appendix A, p. 118, lns. 22-24)

RULING: OBJECTION OVERRULED.

Brief p. 79: w. "Q. BY MR. McKENDREE: Did ever perform any service on behalf of Dorothy A. Palacios that you were specifically requested to perform by any representative of Earl Holding or any official of any business entity with which he was associated, including. Sinclair Oil Corporation?" (Appendix A, p. 1261, lns. 15-20)

RULING: OBJECTION OVERRULED.

Brief p. 97: gg. "Q. BY MR. MCKENDREE: Did you commuinicate with Ms. Palacios in any way regarding the fact of the decertification election in Sinclair, Wyoming?" (Appendix A, p. 141, lns. 9-11)

RULING: OBJECTION SUSTAINED.

Brief p. 100: ii. "Q. BY MR. MCKENDREE: Did any representative of Sinclair Oil Company or any official of any entity associated with Mr. Holding request you to communicate with Ms. Palacios in respect to the decertification election which was scheduled but had not yet been held amongst the employees of the Sinclair refinery in Sinclair, Wyoming?" (Appendix A, p. 142, lns. 4-9)

RULING: OBJECTION OVERRULED.

Brief p. 107: 00. "Q. BY MR. MCKENDREE: In discharging your attorney relationship for Sinclair Oil Company, did you recommend or suggest to Dorothy A. Palacios that she commence a civil action against the OCAW in Superior Court in California in 1985?" (Appendix A, p. 168, lns. 5-9)

RULING: OBJECTION SUSTAINED

J. RODNEY McINTYRE DEPOSITION

Brief p. 111: a. "Q. (BY MR. McKENDREE) Do you recall what he [Defendant Earl Holding] said [during a meeting (with Gruender) held at the Sinclair Refinery on Tuesday, April 24, 1984, the purpose of which was to review the Palacios letter?" (Appendix C, p. 26, lns. 4 and 5)

RULING: OBJECTION SUSTAINED.

Brief p. 113: b. "Q (BY MR. McKENDREE) What did Mr. Ensign [a public relations employee of Defendant Sinclair Oil from

Washington, D.C.] say [at the April 24, 1984, meeting at the Sinclair Refinery the day before the decertification election]?" (Appendix C, p. 27, lns. 1 and 2).

RULING: OBJECTION SUSTAINED.

Brief p. 113: C. "Q (BY MR. McKENDREE) And if I went through all the trouble, Mr. McIntire, Of asking you several questions specifically with respect to descriptions of your recollection of this meeting [the April 24, 1984, meeting (with Gruender) at the Sinclair Refinery held the day before the decertification election], I gather from your earlier response you would decline to answer such questions on the advice of your attorney. Is that true?" (Appendix C, p. 27, lns. 23-25, p. 28, lns. 1-4).

RULING: OBJECTION SUSTAINED.

Brief p. 114: d. "Q Did you express any concern to anyone over the importance of checking out the accuracy of the contents of Exhibit A [the letter authored by Dorothy A. Palacios] because she [Dorothy A. Palacios] was discharged [by the OCAWIU]?" (Appendix C, p. 137, lns. 10-13)

RULING: OBJECTION SUSTAINED.

Brief p. 116: f. "Q. So I would like you to describe, and I hope you will treat this as a catch-up question, designed to meet our objective with this deposition, every conversation you had [where Daniel Gruender was present] about Exhibit A [the defamatory letter to the employees authored by Dorothy A. Palacios]. (Appendix C, p. 132, lns. 2-5)

RULING: OBJECTION SUSTAINED.

Brief p. 118: g. "Q. Now in any conversation that Mr. Gruender had with you, any of them, or in any conversation that you were present and Mr. Gruender was present and Dorothy A. Palacios was being discussed, did he ever state that he was making any statements

as the attorney for Dorothy A. Palaicos (sic)?" (Appendix C, p. 134, Ins. 13-18).

RULING: OBJECTION SUSTAINED.

M. DALE ENSIGN DEPOSITION

Brief p. 120: b. "Q. What did you say to he (Daniel Gruender] and he to you [during a conversation wherein the witness was discussing learning of the decertification election from Defendant Holding]?" (Appendix D, p. 25, In. 12)

RULING: OBJECTION SUSTAINED.

Brief P. 127: "Q: So there was no conversation, would I be correct in concluding, wherein Mr. Gruender described to you or others in your presence knowledge regarding Palacios's treatment by OCAW that to his attention because he was Palacios's attorney, as this record reflects?" (Appendix D, p. 72, Ins. 5-9)

RULING: OBJECTION SUSTAINED.

Brief p. 129: "Q. (By Mr. Mckendree) So the alleged assignment to dig up dirt on Mr. Holding—you may want to object to this question, Counsel—is in addition to Exhibit A [the defamatory letter prepared by Dorothy A. Palacios for submission to the Sinclair employees] information that came to your attention from statements made by Mr. Gruender?" (Appendix D, p. 85, Ins. 17-21)

RULING: OBJECTION SUSTAINED.

Brief p. 130: "Q. Describe what he (Gruender) said."

Brief p. 131: "Q. What was said?" (Report by Gruender) (Appendix D, p. 100, Ins. 23-25, p. 101, Ins. 1-17)

RULING: OBJECTION SUSTAINED.

Brief p. 134: J. "Q. (BY. MR. McKendree) Do you know why the letter [authored by Dorothy A. Palacios to all employees of Sinclair] was not distributed to the employees at the [Sinclair] refinery on April) 24 [1984]?"

RULING: OBJECTION OVERRULLED

ANNE HOLDING DEPOSITION

Brief p. 135: a. "Q: Describe what was said [at a meeting held, with Daniel Grunder (sic) and others, wherein the witness first saw the Dorothy Palacios defamatory letter] about the document [the Dorothy Palacios defamatory letter written to all employees at Sinclair], please, ma'am." (Appendix E, p. 25, lns. 15 and 16)

RULING: OBJECTION SUSTAINED.

Brief P. 136: b. "Q. . . . Did Mr. Gruender state he wanted the Rawlins Daily Times to have a copy of Ms. Palacios' letter because it would assist Miss Palacios in her claims against OCAW?" (Appendix E, p. 27, lns. 22-25)

RULING: OBJECTION SUSTAINED.

Brief p. 138: C. "Q. (BY. MR. McKENDREE) Describe the reason or purpose for being in the Rawlins Daily Times offices at or about 8:00 p.m. on April the 24th." (Appendix E, p. 28, lns. 6-8)

RULING: OBJECTION OVERRULLED

CAROL HOLDING DEPOSITION

Brief p. 139: "Q. (BY MR. McKENDREE) Could you describe what transpired at this meeting, (with Gruender) please, ma'am?" (Appendix F, p. 9, lns. 7 and 8)

RULING: OBJECTION OVERRULED.

Brief p. 139: "Q. (BY MR. McKENDREE) Do you know what the purpose of this meeting (with Gruender) was?" (Appendix F, p. 10, lns. 2 and 3)

RULING: OBJECTION OVERRULLED

Brief p. 140: "Q. (BY MR. McKENDREE) Describe everything that occurred at this meeting (with Gruender) that dealt only with Exhibit A. You don't need to describe other matters that were then discussed." (Appendix F, p. 11, lns. 12-15)

RULING: OBJECTION OVERRULLED

Brief p. 142-143: b. "Q. What do you recall transpired at that time [at the time of the meeting held in Montecito, California, in April of 1985, attended by the deponent, Carol Holding, her husband, Defendant Earl Holding, Dorothy Palacios, attorney Dan Bushnell and attorney Dan Gruender]?" (Appendix F, p. 53, ln. 7)

RULING: OBJECTION OVERRULED.

Brief p. 143: "Q. (BY MR. McKENDREE) Do you recall whether or not there were any documents that were examined at that meeting?" (Appendix F, p. 53, lns. 10-12)

RULING: OBJECTION OVERRULED.

Brief p. 143: "Q. (BY MR. McKENDREE) Was there any conversation [during the meeting held in Montecito, California] about Ms. Palacios filing suit against the OCAW?" (Appendix F, p. 53, lns. 15-17)

RULING: OBJECTION OVERRULED.

Brief p. 145: "Q. (BY MR. McKENDREE) Do you know who paid either Mr. Gruender's expenses or Ms. Palacios' expenses for attendance at that meeting [held at Montecito, California, in April, of 1985]?" (Appendix F, p. 54, lns. 8-10)

RULING: OBJECTION OVERRULED.

TERRY M. SIMONSON DEPOSITION

Brief p. 146: a. "Q. And what did Mr. Gruender say [at a meeting held on April 24th in Sinclair, Wyoming, in the office of Terry Simonson]?" (Appendix G, p. 163, ln. 13)

RULING: OBJECTION SUSTAINED.

Brief p. 147: b. "Q What was there about the letter [authored by Dorothy Palacios and distributed to the Sinclair employees] that you yourself felt or heard others say would be helpful to the company [Defendant Sinclair Oil Company) in winning the [decertification] election?" (Appendix G, p. 167, lns. 22-24)

RULING: OBJECTION SUSTAINED.

Brief p. 149: "Q. So you did not hear anyone state why they felt this letter should be distributed to the employees. Is that what I understand your response to be, sir?"

"A. With the exception of those remarks made by Dan Gruender, that's correct." (Appendix G, p. 170, lns. 22-25, p. 171, lns. 1-16)

RULING: OBJECTION SUSTAINED.

ROBERT EARL HOLDING DEPOSITION

Brief p. 150: a. "Q. (BY MR. McKENDREE) What advice were you seeking [when Defendant Holding spoke to Attorney Dan Gruender during a telephone conversation regarding Dorothy Palacios' inquiry to Defendant Holding concerning Defendant Holding contacting an attorney to represent her]?" (Appendix H, Vol. I, p. 50, lns. 2 and 3)

RULING: OBJECTION SUSTAINED.

Brief p. 154: d. "Q. At any of the conversations in April of 1984 after you saw Exhibit A [the defamatory letter authored by Dorothy Palacios distributed to Sinclair employees], did Mr. Gruender state to you explicitly, that is, did he use words to the effect indicating that any of his communications with you were in his capacity as Dorothy A. Palacios' attorneys?" (Appendix H, Vol. I, p. 72, Ins. 24 and 25, p. 73, Ins. 1-4)

RULING: OBJECTION SUSTAINED.

Brief p. 155: "Q. (BY MR. McKENDREE) Was the question of Palacios suing OCAW in California discussed at this meeting [a meeting held in Montecito, California, attended by Defendant Earl Holding, his wife Carol Holding, Dorothy Palacios, Daniel Gruender, and Daniel Bushnell]?" (Appendix H, Vol. I, p. 122, Ins. 23-25)

RULING: OBJECTION OVERRULED.

Brief p. 156: f. "Q. Did you direct Mr. Ensign and Mr. Gruender to go to the newspaper offices [offices of the Rawl ins Daily Times] on April the 25th [19841 in any measure, that is, in part or something greater than a part, because of advice you received from Dan Gruender?" (Appendix H, Vol. I, p. 141, Ins. 15-19)

RULING: OBJECTION SUSTAINED.

Brief p. 157: g. "Q. What did Mr. Simonson say about Mr. Foley [during a meeting or meetings held with Daniel Gruender prior to the decertification election when, during one of these meetings, the defamatory Dorothy Palacios letter was provided to the witness by Mr. Gruender]?" (Appendix H, Vol. I, p. 150, In. 2)

RULING: OBJECTION SUSTAINED.

Brief p. 158: h. "Q. Do you recall that every time Mr. Simonson made such statement [sic] [statements concerning Plaintiff John Foley]

that the purpose of the meeting was to secure legal advice and/or to discuss legal strategy?" (Appendix H, Vol. I, p. 150, Ins. 19-22)

RULING: OBJECTION OVERRULED.

Brief p. 160: J. "Q. (BY MR. McKENDREE) You knew, did you not, that the only reason Palacios filed EEOC and NLRB charges was because Gruender told her to?" (Appendix H, Vol. I, p. 152, Ins. 17-19)

RULING: OBJECTION SUSTAINED.

Brief p. 161: "Q. (BY MR. McKENDREE) You knew, did you not, when you filed those reports [unindentified reports] that the EEOC charges and NLRB charges that Ms. Palacios filed [against the OCAWIU] were filed after the Meeting [a meeting held in La Jolla, California, with Daniel Gruender and Jay Yudein, an attorney practicing with Mr. Gruender, in late January or early February, 1984] referred to in her letter to you dated February, 1984 [attached at p. 21 of Appendix L]?" (Appendix H, Vol. I, p. 152, Ins. 22-25, p. 153, In.1)

RULING: OBJECTION SUSTAINED.

Brief p. 161: k. "Q. Describe what transpired at that occasion [during a meeting (with Gruender) held on the morning of April 25, 1984, at the Sinclair Refinery, the day prior to the decertification election]." (Appendix H, Vol. II, p. 215, In. 10)

RULING: OBJECTION SUSTAINED.

Brief p. 163: l. "Q. Describe what was said to you on that occasion [on the occasion of the return by Daniel Gruender and Dale Ensign to the Sinclair Refinery, on the day prior to the decertification election, from a meeting with Rawlins Daily Times personnel]." (Appendix H, Vol. II, p. 216, Ins. 19 and 20)

RULING: OBJECTION SUSTAINED.

Brief p. 164: m. "Q. (BY MR. McKENDREE) Was the purpose of this meeting meeting (sic) held immediately after the return by Daniel Gruender and M. Dale Ensign to the Sinclair Refinery after meeting with personnel of the, Rawlins Daily Times for anything other than for Gruender to report to you as to what transpired?" (Appendix H, Vol. II, p. 216 l(sic) Ins. 24 and 26, p. 217, (sic) In.]) (sic)

RULING: OBJECTION OVERRULED.

Brief p. 165: n. "Q. Describe what was said [at either another meeting held later on the day idmediately preceding the decertification election, or at a continuation of the meeting held after the individuals returned from the Rawlins Daily Times office, at which meeting Daniel Gruender and others were in attendance]." (Appendix H, Volume II, p. 218, In. 2)

RULING: OBJECTION SUSTAINED.

Brief p. 165-166: 0. "Q. . . . The second sentence [of the McIntire letter distributed to the Sinclair employees with the Palacios defamatory letter] reads, 'She,' referring to Palacios, 'is willing to talk to you personally if you wish'.

"How does Sinclair know that on April the 25th [1984, the day immediately preceding the decertification election at the Sinclair, Wyoming refinery] that Palacios was willing to speak to any employees?" (Appendix H, Volume II, p. 221, Ins. 7-11)

RULING: OBJECTION OVERRULED.

Brief p. 167: P. "Q: (BY MR. McKENDREE) Did you instruct anyone, including your attorneys, to communication (sic) with Ms. Palacios when you learned of the existence of Exhibit A [the defamatory letter] and thereafter?" (Appendix H, Volume II, p. 225, Ins. 17-20)

RULING: OBJECTION SUSTAINED.

Brief p. 168-169: q. "Q. Do you know whether or not Mr. Gruender spoke with Ms. Palacios during the week of April 24th [1984, two days prior to the decertification election in Sinclair, Wyoming], that is, this week when you first learned of the existence of Exhibit A [the defamatory letter authored by Dorothy Palacios and distributed to the Sinclair Refinery employees], in respect to matters he was representing Ms. Palacios on?" (Appendix H, Volume II, p. 226, lns. 4-8)

RULING: OBJECTION SUSTAINED.

CAROL HOLDING DESPOSITION

Brief P. 192: 1. "Q. Where was that meeting [the meeting held in April, 1985 in Monticito, (sic) California attended by Carol Holding, Dorothy Palacios, Dan Bushnell, Dan Gruender, and Earl Holding], do you recall?" (Appendix F, pg. 53, ln. 5)

RULING: OBJECTION OVERRULED.

Brief p. 192: "Q? What do you recall transpired at that time [the meeting held in April, 1985 in Monticito, (sic) California attended by Carol Holding, Dorothy Palacios, Dan Bushnell, Dan Gruender, and Earl Holding]?" (Appendix F, pg. 53, ln. 7)

RULING: OBJECTION OVERRULED.

Brief p. 192: "Q. (BY MR. McKENDREE) Do you recall whether or not there were any documents that were examined at that meeting [the meeting held in April, 1985 in Monticito, (sic) California attended by Carol Holding, Dorothy Palacios, Dan Bushnell, Dan Gruender, and Earl Holding]?" (Appendix F, pg. 53, lns. 10-12)

RULING: OBJECTION OVERRULED.

Brief 192-193: "Q. (BY MR. McKENDREE) Was there any conversation about Ms. Palacios filing suit against the OCAW [the meeting held in April, 1985 in Monticito, (sic) California attended by Carol Holding, Dorothy Palacios, Dan Bushnell, Dan Gruender, and Earl Holding]?" (Appendix F, pg. 53, lns. 15-17)

RULING: OBJECTION OVERRULED.

Brief p. 193: "Q. (BY MR. McKENDREE) Do you know who paid for Mr. Gruender's time in being present at that meeting [the meeting held in April, 1985 in Monticito, (sic) California attended by Carol Holding, Dorothy Palactsios, Dan Bushnell, Dan Gruender, and Earl Holding]?" (Appendix F, pg. 53, ln. 1; pg. 54, lns. 1-2)

RULING: OBJECTION OVERRULED.

Brief p. 193: "Q. (BY MR. McKENDREE) Do you know who paid either Mr. Gruender's expenses or Ms. Palacios, expenses or attendance at that meeting [the meeting held in April, 1985 in Monticito, (sic) California attended by Carol Holding, Dorothy Palacios, Dan Bushnell, Dan Gruender, and Earl Holding]?" (Appendix F, pg. 54, lns. 8-10)

RULING: OBJECTION OVERRULED.

PLAINTIFFS' SUPPLEMENTAL MOTION TO COMPEL FRITZ, MOYLE, WHITE, ASICH AND CANNON DEPOSITIONS

Supp. Brief p. 4: "What did he (Gruender) say?" "After Mr. Gruender returned to the receiver of the telephone instrument, after speaking with Mr. Holloway, then what was said?" (and other questions to the same effect). (Fritz, Appendix 2, p. 133, ln. 14; Moyle, Appendix 31 p. 35, ln. 11; White, Appendix 4, p. 16, ln. 2; Asich, Appendix 5, p. 24, ln. 12; Cannon, Appendix 6, p. 5, ln. 8).

RULING: OBJECTION OVERRULED.

GERALD FRITZ DEPOSITION

Supp. Brief, p. 8: a. "Q. Describe what transpired. [During a private meeting or private meetings when the witness first saw the defamatory Palacios letter the few days immediately prior to the decertification election, which meeting or meetings were attended by management people and attorney Daniel Gruender]." (Appendix 2, page 14, line 9)

RULING: OBJECTION SUSTAINED.

CLAIR MOYLE DEPOSITION

Supp. Brief, p. 12: a. "Q. Could you describe briefly how you participated in that decision? [The decision to terminate Vernon Holloway] (during meeting with Gruender) What did you do to participate in the decision?" (Appendix 3, page 23, lines 7-9)

RULING: OBJECTION SUSTAINED.

IT IS FURTHER ORDERED that the additional discovery emanating from the rulings made herein shall be completed on or before 21 April 1986;

IT IS FURTHER ORDERED that the hearing on Defendants' summary judgment Motion previously set for 28 February 1986 is hereby stricken and that hearing is reset for 16, May 1986 before the Court at the Carbon County Courthouse in Rawlins, Wyoming.

Copies to:

John Mckendree RRT A. HILL,
Donald J. Mares
Donald J. Mares
Richard Rideout
James L. Applegate
Dan S. Bushnell

_____
ROBERT A. HILL,
District Judge

APPENDIX E

IN THE SUPREME COURRT, STATE OF WYOMING
OCTOBER TERM, A.D. 1987

No. 86-239

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, JOHN E. FOLEY, AND JOSEPH M. MISBRENER,

Appellants
(Plaintiffs)

v.

SINCLAIR OIL CORPORATION, a Wyoming and Delaware corporation, EARL HOLDING, individually and as Director and Officer of Sinclair Oil Corporation, J.R. McINTIRE, individually and as Refinery Manager and employee of Sinclair Oil Corporation, and JOHN DOE(s), whether singular or plural, that individual or those individuals who participated in the republishing of the defamatory statement,

Appellees
(Defendants).

ORDER DENYING PETITION FOR REHEARING

Appellants having filed a Petition for Rehearing and the Court, having examined the files and record of the Court and being fully advised in the premises, and having considered carefully the Petition for Rehearing and the Brief in Support of Their Petition for Rehearing, finds that there is no basis for granting a rehearing in this case and that the Petition for Rehearing should be denied, and it therefore is

ORDERED that the Petition for Rehearing filed herein be, and the same hereby is, denied.

January 14, 1988.

BY THE COURT*

C. STUART BROWN
Chief Justice

*Urbigkit, Justice, would have granted rehearing.

(3)

No. 87-1936

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, JOHN E. FOLEY, and JOSEPH M. MISBRENER,

Petitioners

v.

SINCLAIR OIL CORPORATION, a Wyoming and Delaware corporation, EARL HOLDING, individually and as Director and Officer of Sinclair Oil Corporation, J.R. McINTIRE individually and as Refinery Manager and employee of Sinclair Oil Corporation, and JOHN DOE(S), whether singular or plural, that individual or those individuals who participated in the republishing of the defamatory statement,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF WYOMING

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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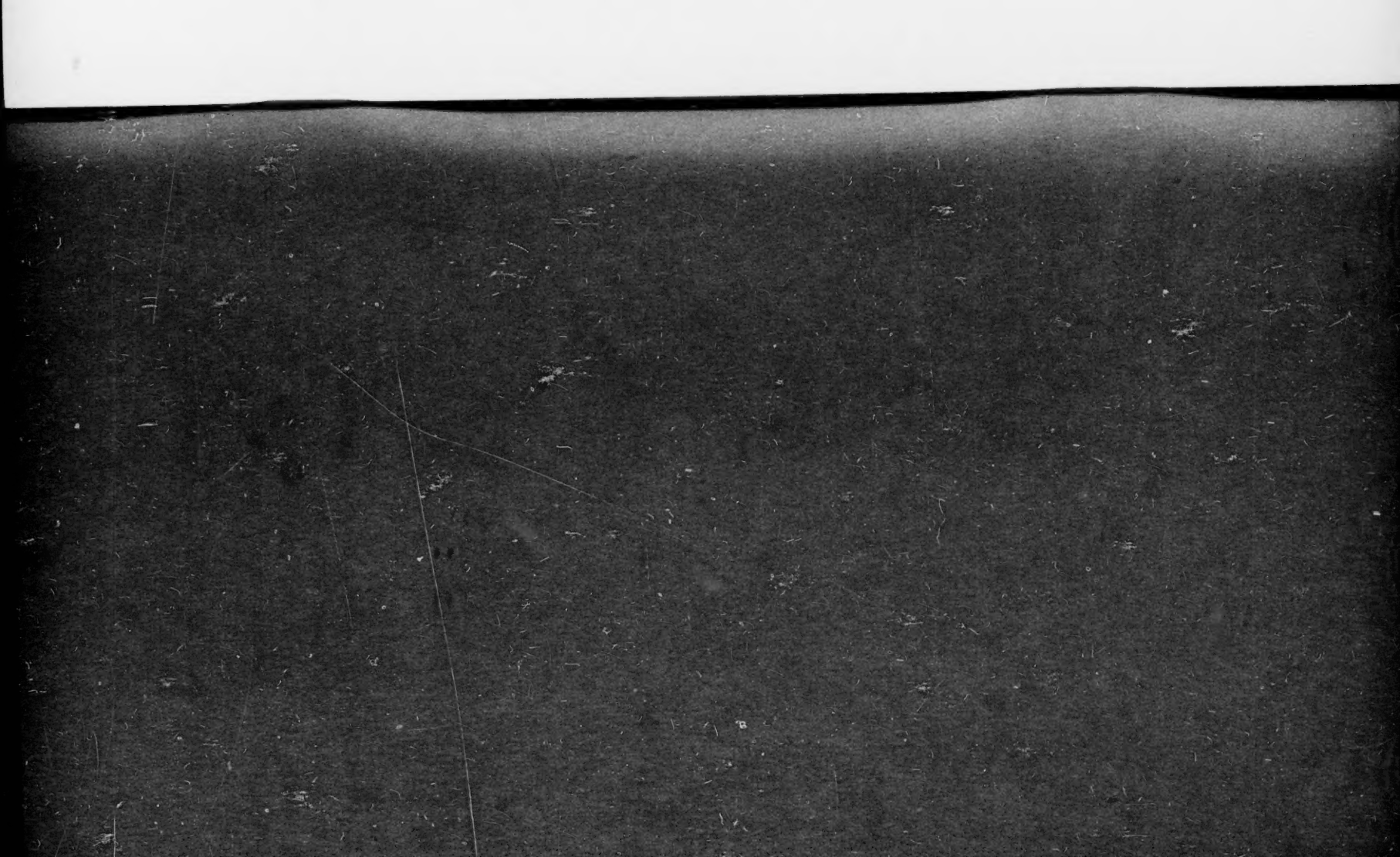

QUESTIONS PRESENTED FOR REVIEW

1. In the context of a labor dispute was the Wyoming Supreme Court wrong to apply *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 and conclude that state libel remedies were available only if a plaintiff could demonstrate actual malice?

2. Whether the trial court and the Wyoming Supreme Court erred in ruling upon the attorney/client privilege concerning communications relating to republication of the Palacios letter?

3. Whether the lower courts were correct in their analyses of the Palacios letter as consisting of non-defamatory factual assertions or of expressions of opinion which are nonactionable in the labor dispute context?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87-1936

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, JOHN E. FOLEY, and JOSEPH M. MISBRENER, Petitioners,

v.

SINCLAIR OIL CORPORATION, a Wyoming and Delaware corporation, EARL HOLDING, individually and as Director and Officer of Sinclair Oil Corporation, J.R. McINTIRE individually and as Refinery Manager and employee of Sinclair Oil Corporation, and JOHN DOE(S), whether singular or plural, that individual or those individuals who participated in the republishing of the defamatory statement, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF WYOMING

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Petitioner, Oil, Chemical and Atomic Workers International Union (OCAW), with offices in Denver, Colorado, is the international union with which OCAW Local Union 2-269

(previously the bargaining agent for Employees at the Sinclair Oil Corporation refinery, Sinclair, Wyoming) is affiliated. Petitioner John E. Foley was and still is the Director of District 1 (California area) of OCAW. Petitioner Joseph M. Misbrener of Denver, Colorado, is now the President of OCAW and was the Vice-President of the Union in 1983 and 1984. Respondent Sinclair Oil Corporation owns and operates the refinery in Sinclair, Wyoming; Respondent Robert E. Holding is a director and officer of Sinclair Oil Corporation (R. Vol. II, p. 251). Respondent J. R. McIntire was the refinery manager for the Sinclair Oil Corporation and the chief negotiator for Sinclair collective bargaining negotiations with OCAW (R. Vol. II, p. 269). He had been attempting to work out the terms of an agreement to succeed the agreement between Sinclair and OCAW which was to expire on January 7, 1983, and negotiations between Sinclair and OCAW continued until the expiration of the agreement on January 7, 1983 (R. Vol. II, p. 269 and R. Vol. VII, Exhibits Appendix, Exhibit 10).

The refinery and the Union were unable to agree, and OCAW filed unfair labor practice charges with the National Labor Relations Board (NLRB) against Sinclair, and Sinclair filed unfair labor practice charges with the NLRB against OCAW. Additional unfair labor practice charges and counter charges were also filed by OCAW and Sinclair. The NLRB dismissed all but one of OCAW's charges against Sinclair, or they were withdrawn, but issued complaints on charges filed by Sinclair against OCAW, which charges were later settled by the Union. (R. Vol. II, pp. 269-270; R. Vol. VII, Exhibits Appendix, Exhibit K.)

In January 1983, Dorothy A. Palacios, had been International Representative for OCAW in California, District 1, under the supervision of Petitioner John E. Foley, who gave her a copy of an OCAW telegram dated January 28, 1983, requesting an investigation of Robert Earl Holding and his businesses. She conducted the investigation of Holding, and made a written report to Petitioner Joseph M. Misbrener on February 7, 1983 (R. Vol. VII, Deposition Excerpts Appen-

dix, Vol. 2, Palacios Deposition, Vol. I, pp. 18-44; R. Vol. VII, Exhibit Appendix, Exhibits B, C and H, pp. 1-2 and 6-17).

In August of the same year, 1983, Palacios filed a harassment grievance against her employer, OCAW, and on 20 September 1983 was terminated from her employment by OCAW. She then filed grievances against OCAW, with her own union, the International Representatives Committee Union, and with the National Labor Relations Board, and with the Equal Employment Opportunity Commission protesting her discharge by OCAW (R. Vol. VII, Deposition Excerpts Appendix, Vol. 2, Palacios Deposition, Vol. I, pp. 48, 65-67, 90, 129-130, 228-232; Palacios Deposition Vol. II, pp. 61-62; and R. Vol. VII, Exhibits Appendix, Exhibit I).

Her controversy with OCAW was favorably settled by her in October 1984 (R. Vol. VII, Exhibits Appendix, Exhibits F, G and I, pp. 133-150). Pursuant to that Settlement Agreement, OCAW agreed to pay a $40,000 lump sum, plus Disability Retirement at the rate of $925 per month, until April 30, 1989, during which period Palacios will continue to accrue years of service towards her pension, and OCAW will contribute $567.33 per month towards Palacios' pension. The OCAW will also furnish Palacios with health insurance and life insurance and continue making contributions into those funds on her behalf of $199.02 per month. OCAW also agreed to pay Palacios $948.12 per month for her pension after May 1, 1989. The total economic effect of this settlement is over $100,000. (R. Vol. VII, Exhibits Appendix, Exhibit F.)

After filing her grievance charges, Palacios, in late 1983 and early 1984 telephoned both Holding's daughter and Holding himself apologizing for conducting the investigation into his background and seeking assistance in finding an attorney to represent her in her own grievances against OCAW (R. Vol. VII, Deposition Excerpts Appendix, Vol. 2, Palacios Deposition, Vol. I, pp. 48-53). On January 10, 1984 and on February 19, 1984, Palacios wrote letters to Holding confirming the previous telephone calls (R. Vol. VII, Deposition Excerpts Appendix, Vol. 2, Palacios Deposition, Vol. I,

pp. 53-63; R. Vol. VII, Exhibits Appendix, Exhibit H, pp. 18-19, and 21).

On February 14, 1984, some employees at the Sinclair Refinery petitioned the NLRB, asking authority to conduct an election for the Sinclair employees to decide whether they wanted to decertify the OCAWIU and its Local 2-269 as the exclusive bargaining agent representative of the Sinclair Refinery employees (R. Vol. VII, Exhibits Appendix, Exhibit K, p. 41).

Ms. Palacios, learning through her attorney Mr. Gruender about the petition for decertification which had been filed by the Sinclair employees, wrote a letter, addressed to "OCAWIU—Represented Employees of Sinclair Oil," and sent a copy to Earl Holding through her attorney, Mr. Gruender. (R. Vol. VII, Deposition Excerpts, Vol. 2, Palacios Deposition, Vol. II, pp. 64-66, 129-131, 134.) She also furnished copies of the OCAW telegram of 20 January 1983 and of her 7 February 1983 Holding Investigation Report (R. Vol. VII, Exhibits Appendix, Exhibits B and C) to attorney Gruender (R. Vol. VII, Deposition Excerpts Appendix Vol. 2, Palacios Deposition Vol. I, pp. 136-137, 221-223).

Holding and McIntire, upon receiving the same, reviewed the Palacios letter and a copy of the January 28, 1983, OCAW telegram from Misbrener's assistant to Foley who assigned the duties of investigating Holding to Palacios. They also reviewed the February 7, 1983 investigation report prepared by Palacios and sent by her to Misbrener, then OCAW Vice-President. Holding had informed McIntire of Holding's previous telephone and letter contacts from Palacios.

Convinced of the truth of the contents of the Palacios letter because of his past difficult experiences with OCAW,[1] and considering the information received in telephone calls

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1. Their past sad experiences with OCAW, described in their depositions, included the OCAW threats, negotiations trickery, intimidation tactics, the inaccurate press releases, the wildcat strike which left the refinery control room unattended, the threats to refuse to assist others in an emergency, the attempt to plant adverse evidence in an OSHA investigation, the incidents of violence such as fights, dead animals placed in employee lock-

and letters from Palacios, along with the OCAW telegram and the Palacios report to OCAW, Mr. Holding consulted with the refinery manager, J.R. McIntire and decided to distribute the Palacios letter to the Sinclair Refinery employees (Affidavits of Holding and McIntire, R. Vol. II, pp. 251-268 and 269-290; R. Vol. VII, Deposition Excerpts Appendix, Vol. I, Holding Depo., Vol. I, pp. 32-36, 53-55, 64-66, 94, 95, 102, 146, 147, 154-160, 166-169, 171, 172, 174, 175, 179-188, 192; Vol. II, pp. 237, 248, 296, 300, 304, 305, 308, 309, 311, 325.)

Both Holding and McIntire stated under oath that neither believed nor had any reason to believe that the statements contained in the Palacios letter were false and neither was aware of any facts which caused him to believe that any part was false (R. Vol. II, pp. 251-252, 272).

It was, then, with all of this background that Holding and McIntire decided to distribute the Palacios letter to Sinclair's refinery employees and to make a copy available to the *Rawlins Daily Times* which had been running a series of articles concerning the decertification election (R. Vol. II, pp. 299-303, 313-314, 316).

Respondent Holding and other Sinclair personnel asked the *Rawlins Daily Times* to publish the letter, but the newspaper declined. The next morning, Daniel Gruender and others again met with representatives of the *Daily Times*. The newspaper then contacted Dorothy Palacios and the union representatives to discuss the letter's contents, and eventually printed an article containing excerpts from the letter.

On April 25, 1984, the evening before the decertification election, Respondents distributed the Palacios letter to Sinclair employees, along with a cover letter authored by J.R. McIntire, refinery manager which explained its receipt by the refinery authorities (R. Vol. II, pp. 272, 290; R. Vol. VII, Exhibits Appendix, Exhibit E).

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ers, and the four letter words scrawled on those lockers, the Courtney truck attack, the scattering of nails on the oil loading rack driveways and the shooting out of the windows of the loading rack house when employees were inside the house.

At the decertification election, the Sinclair Refinery employees voted 112 to 27 to decertify OCAWIU and its Local 2-269 as bargaining agents (R. Vol. VII, Exhibits Appendix, Exhibit K, pp. 42). OCAW filed no objections to the tally of ballots nor to the conduct of the election with the NLRB within the time provided therefor (R. Vol. VII, Exhibits Appendix, Exhibit K, p. 43). However ten (10) months later the Petitioners filed this suit on 22 February 1985 (R. Vol. I, p. 1.) alleging by their Amended Complaint various causes of action against Defendants/Respondents because of the republication of an allegedly defamatory letter authored by Dorothy A. Palacios, a former International Representative of OCAWIU.

After extensive discovery had been conducted Respondents filed a motion to dismiss or, in the alternative, for summary judgment. Petitioners then filed a motion to compel discovery, challenging Respondents' assertions of the attorney/client privilege. On 28 February 1986, the Trial Court entered an order sustaining many of Respondents' attorney/client privilege objections. After further discovery was conducted, the court granted Respondents' motion for summary judgment. In a decision letter, the court indicated that Respondents were entitled to summary judgment for two reasons. First, the court concluded that Petitioners had failed to demonstrate with convincing clarity that Respondents acted with actual malice in publishing the alleged defamatory material. Second, the court ruled that as a matter of law the alleged defamatory material consisted of nonactionable opinion. Either one of the alternative rulings, if correct, provided a sufficient basis for the entry of summary judgment against Petitioners. The Wyoming Supreme Court affirmed the trial court's conclusion that Petitioners failed to provide clear and convincing evidence to demonstrate actual malice.

1. IN THE CONTEXT OF A LABOR DISPUTE WAS THE WYOMING SUPREME COURT WRONG TO APPLY *LINN V. UNITED PLANT GUARD WORKERS OF AMERICA,* 383 U.S.

53 AND IN CONCLUDING THAT STATE LIBEL REMEDIES WERE AVAILABLE ONLY IF A PLAINTIFF COULD DEMONSTRATE ACTUAL MALICE?

Petitioners contend that the Wyoming Supreme Court incorrectly applied the principles of *Linn v. United Plant Guard Workers,* 383 U.S. 53, 86 S. Ct. 657, 15 L.Ed. 582 (1966) in deciding this case. A straightforward reading of the *Linn* case, however, leads to just the opposite conclusion. The Wyoming Supreme Court carefully and correctly treated this point in its opinion below, *OCAW v. Sinclair Oil Corp.,* 758 P.2d 283 (Wyo. 1987) at pp. 287-289 (Appendix A, pp. App. 10-12).

The Amended Complaint alleged that the Palacios letter was distributed as campaign material to Sinclair's Employees during the decertification election campaign the day before the employees were to vote for, or against continued representation of OCAWIU (R. Vol. I, p. 50 ¶17). Accordingly, the actual malice test approved in *Linn, supra* is applicable.

In *Linn, supra,* the Court held that a state court suit alleging a party to a labor dispute was libeled by false and defamatory statements circulated during the course of a union election campaign will be preempted by the National Labor Relations Act, 29 U.S.C. §151 *et seq.,* unless there is "actual malice" and actual damages attributable to the libel. The Court reaffirmed its definition of "actual malice" as defamatory statements published ". . .with knowledge of their falsity, or with reckless disregard of whether they were true or false. . . ." *Id.,* 383 U.S. at 65, 15 L.Ed.2d at 591.

This Court also noted in *Linn, supra,* that:

> "Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. In deed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, mis-

representations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language. Cafeteria Union v. Angelos, 320 US 293, 295, 88 L ed 58, 59, 64 S Ct 126 (1943). It is therefore necessary to determine whether libel actions in such circumstances might interfere with the national labor policy."

383 U.S. at 58, 15 L.Ed.2d at 587.

Thus, the Court extended the "actual malice" test and protection afforded to the media in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412 (1964) to cases which arise between disputants in a union election campaign setting.

In *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin,* 418 U.S. 264 at 272-273, 94 S. Ct. 2770, 41 L.Ed.2d 745 at 755 (1974), the Court reaffirmed the Linn standard, that:

"[L]ibel actions under state law were pre-empted by the federal labor laws to the extent that the State sought actionable defamatory statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth."

Linn, supra, and *Old Dominion, supra,* recognize that federal law gives a union license to use intemperate, abusive or insulting language without fear of restraint or penalty, if the union believes such rhetoric to be an effective means to make its point. This protection applies with equal force to statements made by or circulated by management under the National Labor Relations Act.

The reason for the more restrictive rules discouraging state court libel and slander suits in labor disputes was a concern expressed by the Court:

"But it has been insisted that not only would the threat of state libel suits dampen the ardor of labor debate and truncate the free discussion envi-

> sioned by the [National Labor Relations] Act, but that such suits might be used as weapons of economic coercion. Moreover, in view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers. In order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy, the possibility of such consequences must be minimized. We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damnge."

Linn, supra, 383 U.S. at 64-65, 15 L.Ed.2d at 591.

This ruling of the Nation's highest tribunal confirmed earlier holdings of various lower courts, and established an unassailable precedent for the principle that unions and union officials engaged in labor disputes are public figures, that such cases involve matters of public interest or general concern, and are subject to the standards enunciated in *New York Times Co. v. Sullivan, supra.* See also *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 106 S. Ct. 1558, 89 L.Ed.2d 783 (1986); *Miller v. Transamerican Press, Inc.,* 621 F.2d 721 (5th Cir. 1980).

The United States Supreme Court cases make clear that, before there can be a holding of actual malice, there must be a proof that a defendant had a "high degree of awareness of probable falsity." *Garrison v. Louisiana,* 379 U.S. 64, 74; 85 S. Ct. 209, 13 L.Ed.2d 125, 133 (1964); and that the defendant "in fact entertained serious doubts as to the truth of the publication," *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L.Ed.2d 262, 267 (1968), such that defendant has "subjective awareness of probable falsity." *Gertz v. Robert Welch Inc.,* 418 U.S. 323 at 325, n. 6, 94 S. Ct. 2997, 41 L.Ed.2d 789 at 802, n. 6 (1974), where

the U. S. Supreme Court noted that the Court, in *St. Amant, supra,* had equated reckless disregard of the truth with such subjective awareness of falsity.

The Wyoming Supreme Court, citing *St. Amant v. Thompson, supra,* stated that "[r]eckless disregard as alluded to in *New York Times v. Sullivan, supra,* connotes that 'there must be sufficient evidence as to permit the conclusion that the defendant in fact entertained serious doubt as to the truth of his publication." *Adams v. Frontier Broadcasting Co.,* 555 P.2d 556, 564 (Wyo. 1976).

In the recent case of *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505; 91 L.Ed.2d 202 (1986) the United States Supreme Court had occasion to emphasize the rule that actual malice must be shown with "convincing clarity" where at page 209 it was said:

> "In *New York Times Co. v. Sullivan,* 376 US 254, 279-280, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (1964), we held that, in a libel suit brought by a public official, the First Amendment requires the plaintiff to show that in publishing the defamatory statement the defendant acted with actual malice—'with knowledge that it was false or with reckless disregard of whether it was false or not.' We held further that such actual malice must be shown with 'convincing clarity.' Id., at 285-286, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412. See also Gertz v. Robert Welch, Inc. 418 US 323, 342, 41 L Ed 2d 789, 94 S Ct 2997 (1974). These New York Times requirements we have since extended to libel suits brought by public figures as well. See, e.g., Curtis Publishing Co. v. Butts, 388 US 130, 18 L Ed 2d 1094, 87 S Ct 1975 (1967)."

Not only did the Court hold that in a libel suit by a public figure, the plaintiff must show that in publishing the defamatory statement, the defendant acted with actual malice, which must be shown with "convincing clarity," but it reversed the

Court of Appeals (which had reversed the Summary Judgment granted by the Trial Court) because *that aspect* had not been considered at the *summary judgment stage.*

The concluding paragraph of the *Anderson* opinion makes clear, that, where actual malice has not been shown with "convincing clarity," summary judgment should be granted for the defendant:

> "In sum, a court ruling on a motion for summary judgment must be guided by the New York Times 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists—that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Because the Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment, we vacate its decision and remand the case for further proceedings consistent with this opinion."

Id., p. 217.

This holding confirms the propriety of the pronouncement of the Wyoming Supreme Court in *Adams v. Frontier Broadcasting Company, supra,* at 562 (Wyo. 1976):

> "A plaintiff in a case such as this, in which the constitutional privilege must be overcome, is charged with a special burden of persuasion requiring him to demonstrate actual malice with *convincing clarity.* Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967); New York Times Co. v. Sullivan, supra at 376 U.S. 285, 286, 84 S.Ct. 710. As noted later, in these cases summary judgments have frequently been relied upon by the courts because where appropriate such an expeditious disposition of the action affords the best protection to the constitutional privilege. This approach has led to a unique requirement, which we emphasize is

limited to cases which involve the constitutional privilege defined by the New York Times case. In ruling upon the presence of a genuine issue of fact as to the existence of actual malice the trial judge must decide whether:

> '* * * [T]he plaintiff has offered evidence of a sufficient quantum to establish a prima facie case, and the offered evidence can be equated with the standard or test of *"convincing clarity"* prescribed by United States Supreme Court decisions * * *.' Chase v. Daily Record, Inc., 83 Wash.2d 37, 43, 515 P.2d 154, 157 (1973).

Accord, United Medical Laboratories v. Columbia Broadcasting System, Inc., 404 F.2d 706 (9th Cir. 1968), cert. den. 394 U.S. 921, 89 S.Ct. 1197, 22 L.Ed.2d 454 (1969), Buchanan v. Associated Press, 398 F.Supp. 1196 (D.D.C. 1975)." [Emphasis supplied.]

See *MacGuire v. Harriscope Broadcasting Co.*, 612 P.2d 830, 831-833 (Wyo. 1980) and *McMurray v. Howard Publications Inc.*, 612 P.2d 14, 17 (Wyo. 1980) to the same effect.

2. WHETHER THE TRIAL COURT AND THE WYOMING SUPREME COURT ERRED IN RULING UPON THE ATTORNEY/CLIENT PRIVILEGE CONCERNING COMMUNICATION RELATING TO REPUBLICATION OF THE PALACIOS LETTER?

The Trial Court, after an extended hearing, resolved the attorney/client questions both generally and specifically in its "Order on Plaintiff's Motion to Compel Discovery" (R. Vol. II, pp. 375-389; Petitioners' Petition Appendix D). Respondents submit that the Trial Court hearing of 11 February 1986 (R. Vol. V) and the Court's Order of 28 February 1986 (R. Vol. II, pp. 375-389; Petition Appendix D) complied with the

requirements announced in *Cordova v. Gosar,* 719 P.2d 625, 633 (Wyo. 1986), and were fair, proper, and well grounded in the applicable law in arriving at the decision concerning attorney/client privilege.

The Trial Court, at page 5 of the 3 July 1986 Decision Letter (R. Vol. II, p. 410; Petition Appendix C-5), further considered the application of the attorney/client privilege question in this case. The Wyoming Supreme Court opinion below dealt in depth with each of the Petitioners' claims that the attorney/client privilege was improperly applied by the Trial Court. *OCAW v. Sinclair Oil Corp.,* 748 P.2d 283, 289-291 (Appendix A, pp. App. 15-18).

Under the pronouncement in *Clark v. U. S.,* 289 U.S. 1, 53 S. Ct. 465, 77 L. Ed. 933 (1932) and the cases holding similarly, Petitioners' argument that Respondents waived the attorney/client privilege, as to communications surrounding or related to the republication of the Palacios letter, because of their assertion of reliance on the advice of counsel in republishing the Palacios letter and due to their affirmative acts of raising malice as an affirmative defense is without force.

The Trial Court's rulings on attorney/client privilege were proper and in compliance with the decisions of the United States Supreme Court. In *UpJohn Co. v. United States,* 449 U.S. 383, 390, 101 S. Ct. 677, 66 L.Ed.2d 584, 592 (1981) the Court pointed out that the attorney/client privilege exists to protect not only the giving of professional advice to those who can act on it, but also to encourage the giving of information to the lawyer to enable him to give sound and informed advice.

3. WHETHER THE LOWER COURTS WERE CORRECT IN THEIR ANALYSES OF THE PALACIOS LETTER AS CONSISTING OF NONDEFAMATORY FACTUAL ASSERTIONS OR OF EXPRESSIONS OF OPINION WHICH ARE NONACTIONABLE IN THE LABOR DISPUTE CONTEXT?

The Trial Court presented a well written, well reasoned opinion on this aspect of the case in its opinion letter of 3 July 1986 (Petitioners' Appendix C-8 through C-14).

The Palacios' letter describing her assignment "to dig up all the dirt you can find on this guy" as "distasteful, insulting, and offensive," was an expression of opinion. As such her description of her task is not actionable, under the holding in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340, 94 S. Ct. 2997, 41 L.Ed.2d 789, 805 (1974):

> "Under the First Amendment, there is no such thing as false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. . . ."

In *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin,* 418 U.S. 264, 283-84, S. Ct. 2770, 2781, 41 L.Ed.2d 745, 761 (1974) the Supreme Court expressed a similar view in a *labor dispute,* saying:

> "The *sine qua non* of recovery for defamation in a labor dispute under Linn is the existence of falsehood. Mr. Justice Clark put it quite bluntly: 'the most repulsive speech enjoys immunity provided it falls short of deliberate or reckless untruth.' 383 U.S., at 63, 15 L.Ed.2d at 82. Before the test of reckless or knowing falsity can be met, there must be a false statement *of fact.*" [Emphasis supplied.]

In *Gregory v. McDonnell Douglas Corporation,* 17 Cal.3d 596, 131 Cal. Rptr. 641, 552 P.2d 425 (1976), a labor dispute, the California Supreme Court held that the statement of opinions did not lose First Amendment protection merely because they attributed improper motives. The Court also noted that the question of whether an allegedly defamatory opinion constitutes a fact or opinion is a question of law, explaining:

> "The distinction frequently is a difficult one, and what constitutes a statement of fact in one con-

> text may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion."

Id., 131 Cal. Rptr. at 644.

In the present case, Ms. Palacios truthfully identified herself as a former employee of OCAW and said she had pending charges against the organization. In that context, as a matter of law, she was expressing an *opinion, not facts,* when she continued:

> "Having experienced, personally, flagrant violation of my rights by OCAW as a Union member; as a professional employee of OCAW; as a dues payer to an OCAW Local (also, the Staff Union, IRCU); and as a USA citizen, I was obliged to file a discrimination/harassment grievance against the OCAW Administration which so angered them that I was terminated from my employment one month later."

OCAW v. Sinclair Oil Corp., supra, p. 285 (Appendix A, p. App. 6).

The same rule is applicable concerning her rhetorical questions and further statements, including her statement that:

> "I found this 'assignment' distasteful, insulting, and offensive, since I considered myself a qualified organizer and not a vulgar spy for those who must ply their trade by trashy, unethical practices . . . nor did I aspire to be a 'digger of dirt'."

Id., at 285 (Appendix A, p. App. 7).

Such remarks are constitutionally protected opinions, under the unmistakable pronouncements of the United States Supreme Court.

Palacios' assertion that "OCAW must have been displeased" by her failure to find anything unsavory about Holding may also be found to be an *opinion*. Indeed, the statement itself is couched in terms of a statement of belief not a statement of fact.

Several other protected statements of Palacios' *opinion* are found on the second page of the Palacios letter (R. Vol. VII, Exhibits Appendix, Exhibits A and H, p. 24; Petition Appendix C-17-C-19). These include the following:

> "[I] was part of an action intended, undeservedly, to malign your employer and I want to take part in clearing the record.
>
> That 'assignment' proved to be a turning point in my life and I was forced to reason . . . not rationalize . . . about this shabby, low affair of 'digging up dirt' or 'throwing mud' to attempt to smear a gentleman of excellent character . . . . but I felt the need to apologize for OCAW. The leadership has abdicated any sense of decency in their desperation to keep their political boat afloat.
>
> Honest union leaders do not need to 'dig dirt' nor stoop to the foul play to which I've been exposed in the last years of my employment by OCAW.
>
> Remember foul 'leadership' leads where you cannot afford to follow . . . ."

Id., at 286 (Appendix A, pp. App. 8-9).

Clearly, under the teachings of *Gertz*, *Old Dominion*, and *Gregory*, *supra*, as well as *Okun v. Superior Court of Los Angeles County*, 175 Cal. Rptr. 157, 629 P.2d 1369 (1981), these statements of *opinion* are not actionable.

In viewing the Palacios letter in its entirety, the thrust of the letter focuses around the factual assertion that Palacios was assigned by Petitioners to find or dig up "dirt" on Respondent Holding and his family, and it is this factual assertion

to which Petitioners take umbrage. Assuming, *arguendo*, that Petitioners did not assign Palacios to "dig up dirt" on Holding, there is still no merit to the complaint since no reasonable man could find that any of the Petitioners were defamed by the casting of such aspersions upon them. Indeed, it is to be expected that unions will try to gather information, or "dig dirt," about their adversaries, particularly during the course of a hotly contested campaign or hard fought negotiations, and the employees they represent expect nothing less. Employees will likely believe that this is part of a union's job, and that one which does less is not doing its job of effectively representing the employees.

The letter also describes in positive terms the favorable information Palacios learned about Respondent Holding. Obviously, this does not defame the Petitioners.

Finally, Palacios in her letter raised some of the same *rhetorical* questions anyone else might likely raise concerning an assignment to dig up dirt. She asked "Why do OCAW so-called leaders need to 'dig dirt'? Were they planning blackmail, presuming to call it 'negotiations'? Was this the intent of such 'investigation'?" Significantly, Palacios answered her own questions by stating "I do not know." *Id.*, at 286.

Two U.S. Supreme Court cases establish the non-libelous nature of the *rhetorical statements* in the Palacios letter. In *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 9 S.Ct. 1537, 26 L.Ed.2d 6 (1970), the Court considered a newspaper story which referred to the position the plaintiff had taken on matters before the city council as "blackmail." The trial court and the Maryland Court of Appeals viewed the use of the word as charging the crime of blackmail, and since the paper knew plaintiff had committed no such crime, it held the newspaper committed libel for the "knowing use of falsehood."

As to this theory, the Supreme Court held that the imposition of liability on such a basis was constitutionally impermissible—that as a matter of constitutional law, the word "blackmail" in these circumstances was not libel. The Court,

in so holding, stated in substance that no one could take the word "blackmail" literally. The Court said:

> "No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. (footnotes deleted). On the contrary, even the most careless reader must have perceived that the word was no more than *rhetorical* hyperbole, a vigorous epithet used by those who consider Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.
>
> To permit the infliction of financial liability upon the petitioners for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments . . . . (Emphasis Added).

398 U.S. at 14, 26 L.Ed.2d at 15.

In *Old Dominion Branch, supra,* the Court dealt with a Union accusation that the plaintiffs were "scabs." This was accompanied by a definition of "scab" by Jack London which included the terms "traitor," "rotten principles," and "lacking character." Plaintiffs alleged these terms were libelous. The Court disagreed. It held that such terms could not be construed as representations of fact, particularly considering the labor context in which they arose. In its view, they were used in "a loose figurative sense" to demonstrate the Union's disagreement with those who opposed unionization. Moreover, the Court found that a dictionary definition of "scab" included one who refused to join the union. Consequently no libel claim existed.

Clearly, no criminal acts were impugned to Petitioners by the Palacios letter as alleged by them in their complaint. All the statements were made in a heated labor dispute con-

text. Rather, Palacios did not more than ask *rhetorical questions* based on the facts at her disposal, and she candidly acknowledged she did not know the answers. The Palacios letter nowhere asserts that Petitioners committed either blackmail or any other crime.

In *Rinsley v. Brandt*, 700 F.2d 1304 (10th Cir. 1983), a psychiatrist brought a false light privacy action against an author. The author in a publication had criticized the doctor's method of treating patients and specifically mentioned the treatment of one child who had later died. The author had stated "what does it take to put a stop to such a man? How many more children must die?" The court held that:

> "[T]hese *rhetorical questions* . . . are severe criticisms of Rinsley (psychiatrist) and his methods. But they are exactly that—exaggerated expressions of criticism. They are the type of statements that our society, interested in free and heated debate about matters of social concern has chosen to protect." (Emphasis added).

Id. at 1309.

The same can be said for the questions raised by the Palacios letter.

As a matter of law, the Palacios letter is not defamatory. The bulk of the statements pertaining to any of the Respondents were *opinions* and *rhetorical questions.* As to the remaining factual assertions regarding the Respondents, even if they were false, they did not defame, since they cannot, as a matter of law, be found to have exposed Petitioners to "public hatred, contempt or ridicule." The question of whether a communication is capable of bearing a defamatory meaning is a legal issue to be decided by the court. Likewise, in a defamation action, the question of whether activities are a "matter of public interest and general concern" is one for the court. *Zimmerman v. Board of Publications of the Christian Reformed Church*, 598 F. Supp. 1002, 1012 (D. Colo. 1984). *Rhetorical questions* which concern the Respondent's methods and motivations, as well as *opinions* which criticize

habits, motives or morals of an individual or organization, are, without more, non-actionable. Accordingly, there is no basis to the complaint.

CONCLUSION

The summary judgment in favor of Respondents and against Petitioners was properly issued for the reasons hereinabove stated. The Wyoming Supreme Court upon thorough consideration of these same claims by Petitioners affirmed the Trial Court.

The attorney/client privilege was not waived by Respondents. Further, the District Court's ruling as to the permissible questions in the depositions, on its face, discloses that the Court carefully considered each challenge, and the rulings were valid.

The Palacios factual statements charged by Petitioners to be libelous were shown by Respondents to be *true,* and such showing was not contradicted by Petitioners. Any statements of opinion by Palacios are constitutionally protected and rhetorical questions are not actionable.

Petitioners failed to plead malice with particularity or to show with convincing clarity that Respondents acted with actual malice. Accordingly, there was no valid claim for libel against Respondents and no basis for conspiracy to libel. As the Trial Court's decision letter explains, there was no genuine issue of material fact and the Respondents were entitled to judgment as a matter of law.

The summary judgment entered for Respondents and later affirmed by the Wyoming Supreme Court should be upheld because (1) the Palacios letter does not, as a matter of law, make defamatory statements about any of the Petitioners; (2) the Complaint, as amended, fails to allege facts to support the conclusory allegations of knowledge of falsity or reckless disregard of truth or falsity, (3) even if the Palacios letter contained false and/or defamatory statements about any of the Petitioners, the letter was not republished

by the Respondents "with actual malice," i.e., with knowledge of the falsity or reckless disregard for the truth or falsity of the statements contained therein, and the entire matter is therefore preempted under the National Labor Relations Act; (4) the allegedly defamatory statements of fact contained in the Palacios letter were true; (5) the Petitioners failed to prove actual malice; and (6) in the absence of actionable libel, there can be no basis for the allegation of conspiracy to commit libel.

The Petition for a Writ of Certiorari should be denied.

Dated this _____ day of June 1988.

Respectfully submitted,

_____

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_____

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APPENDIX A

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, John E. Foley, and Joseph M. Misbrener, Appellants (Plaintiffs),

v.

SINCLAIR OIL CORPORATION, a Wyoming and Delaware corporation, Earl Holding, individually and as Director and Officer of Sinclair Oil Corporation, J.R. McIntire, individually and as Refinery Manager and employee of Sinclair Oil Corporation, and John Doe(s), whether singular or plural, that individual or those individuals who participated in the republishing of the defamatory statement, Appellees (Defendants).

No. 86-239.

Supreme Court of Wyoming.

Dec. 22, 1987.

International union and its officers brought defamation action against employer and its officers arising out of publication of allegedly defamatory letter written by former international union employee at time of decertification election. The District Court, Carbon County, Robert A. Hill, J., entered summary judgment in favor of employer and its officers. International union and its officers appealed. The Supreme Court, Cardine, J., held that: (1) actual malice standard applied to case; (2) international union and officers were required to demonstrate actual malice with convincing clarity; (3) employer and officers did not waive attorney-client privilege; and (4) knowledge of officers and employer of ill will of former international union employee did not by itself prove knowledge of probable falsity of alleged defamatory statement.

Affirmed.

Urbigkit, J., filed a dissenting opinion.

1. Libel and Slander Key No. 4

Actual malice standard applied to defamation case brought by international union and its officers against employer and its officers arising out of letter by former international union employee prepared at time of decertification election.

2. Libel and Slander Key No. 112(2)

In libel case involving labor dispute, plaintiff international union and its officers were required to demonstrate actual malice with convincing clarity.

3. Appeal and Error Key No. 1074(3)

Trial court's refusal to strike supplemental memorandum and appendix of appellees in defamation action arising out of labor dispute did not rise to the level of prejudicial error; outcome of appeal would not be affected if material in disputed document was disregarded.

4. Evidence Key No. 206

Joint attorney-client exception to waiver of attorney-client privilege applied to communications between former international union employee and attorney, who represented both former union employee and an employer; former international union employee and employer and officers enjoyed significant identity of interest in their fight against international union.

5. Witnesses Key No. 219(3)

Employer and officers, who were defendants in libel action brought by international union and its officers, did not waive attorney-client privilege, with respect to discussions among employer's personnel and employer's attorney concerning decision to distribute allegedly defamatory letter, by raising lack of malice as a defense; malice became an issue as a result of affirmative acts of international union and its officers in filing defamation complaint.

6. Pretrial Procedure Key No. 34

Defendants in defamation action did not waive attorney-client privilege by stating during discovery that their decision to publish a letter was made with advice and assistance of counsel.

7. Witnesses Key No. 201(2)

Attorney-client privilege could apply to allegedly defamatory communications, even if they involved contemplated tortious acts.

8. Libel and Slander Key No. 51(1), 112(1)

Knowledge of employer and its officers that allegedly defamatory letter was biased against international union did not by itself prove their knowledge of probable falsity of alleged defamatory statement nor did it impose on them an additional burden of extensive independent investigation.

Richard Rideout, of Freudenthal, Salzburg, Bonds & Rideout, Cheyenne, and Donald J. Mares, of Law Office of John W. McKendree, Denver, Colo., for appellants, argument by McKendree.

Glenn Parker and James Applegate, of Hirst & Applegate, Cheyenne, and Dan S. Bushnell, of Kirton, McConkie & Bushnell, Salt Lake City, Utah, for appellees, argument by Messrs. Applegate and Bushnell.

Before BROWN, C.J., and THOMAS, CARDINE, URBIGKIT, and MACY, JJ.

CARDINE, Justice.

The stakes were high. The union, OCAW, and Sinclair Oil Corporation were locked in a contest for votes of Sinclair employees in a union decertification election. As expected, each party was commendably zealous in free and open debate presenting their respective positions. A letter, critical of the union and its officers, written by a former employee of OCAW, was circulated among Sinclair employees. OCAW lost

the election. An action for damages, claimed to result from defamation by the letter, was brought against Earl Holding and other officers and representatives of Sinclair. OCAW and its officers lost the lawsuit by summary judgment. They now appeal to this court, raising the following issues: (1) whether the trial court erred in applying a subjective definition of actual malice and an evidentiary standard of convincing clarity; (2) whether the trial court erred in refusing to strike a supplemental memorandum and appendix filed by appellees in support of their motion for summary judgment; (3) whether the trial court erred in ruling that questions propounded to certain witnesses sought information which was protected by the attorney-client privilege; (4) whether the trial court erred in granting appellees' motion for summary judgment because of the existence of credibility issues; (5) whether factual issues existed which precluded summary judgment; (6) whether the trial court improperly relied upon incompetent testimony of appellants Misbrener and Foley; and (7) whether the trial court erred in concluding as a matter of law that significant portions of the alleged defamatory letter constituted protected opinion.

We affirm.

FACTS

The present controversy concerns events surrounding a 1984 union decertification election held at the Sinclair Oil Corporation refinery in Sinclair, Wyoming. Prior to the election, Local 2-269 of the Oil, Chemical and Atomic Workers Union (OCAW) was the exclusive bargaining agent for employees at the Sinclair Refinery. Appellant Oil, Chemical and Atomic Workers International Union (OCAWIU) is the international union with which the local union was affiliated.

From 1972 to 1983, Dorothy Palacios was employed by OCAWIU as an international representative. Early in 1983, appellant John "Jack" Foley, her supervisor, asked her to conduct research in the southern California area to obtain information which might be helpful to the union in negotiations with the Sinclair Refinery. Specifically, the union sought

information concerning the Sinclair corporation, refinery owner Robert Earl Holding, and other businesses in which Holding had an interest.

In accordance with her instructions, Ms. Palacios traveled to San Diego and conducted a search of public records. She also visited the Westgate Hotel in San Diego, an enterprise owned by appellee Holding or one of his entities. While at the hotel, she happened to meet Mr. Holding and spoke with him briefly. Ms. Palacios then prepared a report on her investigation and submitted it to appellant Joseph M. Misbrener, who at that time was the vice president of the union.

In August of 1983, Ms. Palacios filed a harassment grievance against OCAW. In September, she was terminated as an employee of OCAWIU. Following her termination, she filed an unfair labor practice charge with the National Labor Relations Board (NLRB) and a discrimination complaint with the Equal Employment Opportunity Commission. Ms. Palacios then contacted appellee Holding and apologized for conducting the 1983 investigation. She also asked him for assistance in finding counsel to represent her in her grievances against the union. In a letter to Mr. Holding dated January 10, 1984, she made the following statements:

> "It is difficult for me to ask for help, but I find it now necessary as I have discovered that it is indeed not simple to find the proper attorney to take such a case. * * * It is, though, with the thought that you, too, should benefit and that, perhaps, aspects of the case will surface which may be of help to you in your association with that organization and I would have it understood with the attorney that any material that arose would be available to you and not submerged by the usual fiduciary attorney/client relationship."

In response to this letter, Ms. Palacios received a call from Daniel Gruender, an attorney whose firm represented Sinclair Oil and several of Holding's entities. Ms. Palacios was

aware that Mr. Gruender's firm represented Sinclair. Mr. Gruender eventually agreed to represent Ms. Palacios in her grievance against OCAWIU. At the same time, he and his firm were involved in the proceedings at the Sinclair Refinery.

Ms. Palacios learned from Mr. Gruender that a decertification election was to be held at the Sinclair Refinery in April of 1984. The purpose of the election was to allow the union members to determine whether OCAW should be decertified as the bargaining agent for the refinery employees. Ms. Palacios then authored the following letter addressed to the OCAW-represented employees of the Sinclair Refinery:

> "It has come to my attention that you are preparing for an election on April 26, 1984. *There are some facts you should know.*
>
> "For nearly 12 years, I had been an International Representative for OCAW; I wish that I could praise the union, but, sadly, I cannot. Having experienced, personally, flagrant violation of my rights by OCAW as a union member; as a professional employee of OCAW; as a dues payer to an OCAW Local (also, the Staff Union, IRCU); and as a USA citizen, I was obligated to file a discrimination/harassment grievance against the OCAW Administration which so angered them that I was terminated from my employment one month later. For public record, both EEOC and NLRB charges have been filed against OCAW. This, of course, is my personal problem. *The subject of serious concern to you follows:*
>
> "One of the assignments I was given as an International Representative for OCAW was to research records and background of your employer, Robert Earl Holding. This assignment came to me from Joe Misbrener, now International President of OCAW, through his Assistant, Dean Alexander, to District 1 Director Jack Foley. Foley told me (quote verbatim) . . . 'Dig up all the dirt you can find on this guy.

Joe needs to get something on him . . . they're having some trouble with Sinclair.'

"I found this 'assignment' distasteful, insulting and offensive since I considered myself a qualified organizer and not a vulgar spy for those who must ply their trade by trashy, unethical practices . . . nor did I aspire to be a 'digger of dirt.' However, I admit that I rationalized that, after all, I was accepting my salary and was obliged to carry out the assignment as instructed by my employer. I performed the investigation with care and extreme diligence. Guess what?

"THE INVESTIGATION REVEALED ABSOLUTELY NOTHING EITHER BAD OR EVEN REMOTELY UNSAVORY ABOUT MR. HOLDING! TO THE CONTRARY . . . I FOUND ONLY VERY GOOD REPORTS ABOUT HIM!

"OCAW must have been displeased by this fact because I never had *one word* from *any* of them *nor even one comment* regarding the 12-page report I sent to Misbrener via certified mail. I received only the returned receipt showing proof of delivery.

"My investigation led to acquaintance with many of Mr. Holding's employees. When I, tactfully, led the conversation to the subject of the union, I was told by the employees that they were not sorry for having decertified the union two years earlier. Admittedly, I was surprised to hear this from the employees. "They spoke of Mr. Holding and his family with warm enthusiasm and genuine sincerity. They assured me that Mr. Holding was a man of integrity whose word was as iron-clad, as binding, as any union contract!

"Neither could I find, though I searched, any employee who suffered any loss as a result of eliminating the union. That these employees so respected,

even revered, their employer aroused my curiosity. They had made it very clear to me that they were not about to reorganize with the union . . . to turn their backs on an employer who treated them well . . . even after two years of having been without a union.

"Released from my employment by OCAW, I am now free of any obligation to remain silent about that investigation. I could not have addressed you as I am now doing while I was still on the union's payroll. Neither, ordinarily, would I voluntarily write to a group of employees about union assignments. In this case, however, I was part of an action intended, undeservedly, to malign your employer and I want to take part in clearing the record.

"That 'assignment' proved to be a turning point in my life and I was forced to reason . . . not rationalize . . . about this shabby, low affair of 'digging dirt' or 'throwing mud' to attempt to smear a gentleman of excellent character . . . as verified by his own workers. Was *this* why I had joined the union? Certainly not! Mr. Holding doesn't know me nor does he need my testimonial to any virtue he possesses; but I felt the need to apologize *for* OCAW. The leadership has abdicated any sense of decency in their desperation to keep their political boat afloat.

"Honest union leaders do not need to 'dig dirt' nor stoop to the foul play to which I've been exposed in the last years of my employment by OCAW. Why do OCAW so-called leaders need to 'dig dirt'? Were they planning to blackmail, presuming to call it 'negotiations'? Was this the intent of such 'investigation'? I do not know. I know only this fact: while, I repeat, there was not one mark against the Holdings, THE GOOD WAS HIGHLY VISIBLE!

"If I were a Sinclair employee, I'd encourage productivity for the benefit of everyone, and I'd give Mr. Holding an opportunity to work unhampered by any 'dirt-seekers.'

"Remember, foul 'leadership' leads where you cannot afford to follow and taints all those connected to it. I used to believe that you could remain above it, stay clear of the 'mud.' Not so. Some of it always sticks to your fingers and is hard to clean off.

"Good luck in your election!

"/s/

"Dorothy A. Palacios

"Former Int'l. Rep.—OCAWIU" (Emphasis in original.)

Ms. Palacios testified that while no one had requested her to prepare the letter, she mailed it to Mr. Gruender and told him he could use it if it would be helpful. She also provided to Mr. Gruender a copy of the report of her investigation of Mr. Holding and a copy of the telegram from OCAWIU requesting that she perform the assignment.

Daniel Gruender delivered the letter to the management of the Sinclair Refinery. Several meetings were then held to determine whether to distribute the letter to Sinclair employees. Daniel Gruender took part in these discussions. Appellee Holding and other Sinclair personnel asked the Rawlins Daily Times to publish the letter, but the newspaper declined. The next morning, Daniel Gruender and others again met with representatives of the Daily Times. The newspaper then contacted Dorothy Palacios and the union representatives to discuss the letter's contents, and eventually printed an article containing excerpts from the letter. On the evening before the decertification election, appellees distributed the Palacios letter to Sinclair employees, along with a cover letter authored by appellee J.R. McIntire. OCAW lost the election the next day.

On February 22, 1985, appellants filed a complaint against appellees, alleging libel and civil conspiracy. After considerable discovery had been conducted, appellees filed a motion to dismiss or, in the alternative, for summary judgment. Appellants then filed a motion to compel discovery, challenging appellees' assertions of the attorney-client privilege. On February 28, 1986, the trial court entered an order sustaining many of appellees' attorney-client privilege objections. After further discovery was conducted, the court granted appellees' motion for summary judgment. In a decision letter, the court indicated that appellees were entitled to summary judgment for two reasons. First, the court concluded that appellants had failed to demonstrate with convincing clarity that appellees acted with actual malice in publishing the alleged defamatory material. Second, the court ruled that as a matter of law the alleged defamatory material consisted of nonactionable opinion. Either one of the alternative rulings, if correct, provided a sufficient basis for the entry of summary judgment against appellants. We affirm the trial court's conclusion that appellants failed to provide clear and convincing evidence to demonstrate actual malice.

I. ACTUAL MALICE

[1] In the crucible of a labor conflict, clashes between the right of free discussion and one's right to be free from defamation are virtually inevitable. This problem was addressed by the United States Supreme Court in *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). In *Linn*, the Court was faced with the question of whether, and to what extent, the National Labor Relations Act preempted the availability of state remedies for libel. In striking a balance between the "congressional intent to encourage free debate on issues dividing labor and management" and the " 'overriding state interest' in protecting its residents from malicious libels," the Court concluded that in the labor dispute context, state libel remedies were available only if a plaintiff could demonstrate

actual malice. Id., 86 S.Ct. at 664. The Court thus adopted "[t]he standards enunciated in *New York Times Co. v. Sullivan,*" 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

In *New York Times Company v. Sullivan,* the Court defined "actual malice" as libel issued "with knowledge that it was false or with reckless disregard of whether it was false or not." Id. 84 S.Ct. at 726. In a subsequent case, the Court stated that in order to show reckless disregard, a plaintiff must provide "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968); see also *Adams v. Frontier Broadcasting Company,* Wyo., 555 P.2d 556 (1976); *MacGuire v. Harriscope Broadcasting Co.,* Wyo., 612 P.2d 830 (1980).

As explained in *McMurry v. Howard Publications, Inc.,* Wyo., 612 P.2d 14, 18 (1980), the New York Times actual malice standard is a subjective one which focuses on the defendant's state of mind:

> " 'knowledge of falsity' involves a *subjective* awareness of the falsity of the statements, and 'reckless disregard' involves sufficient evidence to permit an inference that the defendant must have, in fact, *subjectively* entertained serious doubts as to the truth of the statements." (Emphasis in original.) Rooney, J., specially concurring.

Appellants argue that while this subjective definition of actual malice is appropriate in cases involving media defendants, it is inappropriate in cases involving labor disputes. We find no merit in this contention. The actual malice standard is applied in media-defendant cases to protect the principle that "debate on public issues should be uninhibited, robust, and wide-open * * *." *New York Times v. Sullivan,* supra, 84 S.Ct. at 721. This principle applies with equal force in the labor dispute context. In *Linn v. United Plant Guard Workers of America, Local 114,* supra, 86 S.Ct. at 663, the Supreme Court said:

> "We acknowledge that the enactment of § 8(c) [of the NLRA] manifests a congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered 'against the background of a profound * * * commitment to the principle that debate * * * should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.' *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). Such considerations likewise weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." (Footnote omitted.)

Moreover, the case law of other jurisdictions provides abundant support for the proposition that the New York Times subjective actual malice standard, as refined by *St. Amant v. Thompson,* supra, applies in the labor dispute context. See *Tosti v. Ayik,* 394 Mass. 482, 476 N.E.2d 928, 935 (1985); *Raffensberger v. Moran,* 336 Pa. Super. 97, 485 A.2d 447, 453 (1984); *Meuser v. Rocky Mountain Hospital,* Colo. App., 685 P.2d 776, 779 (1984); *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of America,* 6 Ohio St.3d 369, 453 N.E.2d 666, 669 (1983); *Montana v. Smith,* 92 A.D.2d 732, 461 N.Y.S.2d 603, 604 (1983). We hold that the trial court correctly applied the actual malice standard.

II. CONVINCING CLARITY

In determining whether appellants provided sufficient evidence to defeat appellees' motion for summary judgment, the trial court applied the evidentiary standard of convincing clarity. Appellants claim that the trial court erred in applying this standard. We disagree.

[2] The requirement that a plaintiff must demonstrate actual malice with convincing clarity was articulated in *New York*

Times Company v. Sullivan, supra. In *Linn v. United Plant Guard Workers of America, Local 114*, supra, the Court stated that the "standards" enunciated in New York Times Company apply in libel cases involving labor disputes. *Linn*, supra, 86 S.Ct. at 664. Thus, the clear and convincing standard is appropriate in this case. See *Meuser v. Rocky Mountain Hospital*, supra.

In *Adams v. Frontier Broadcasting Co.*, supra, 555 P.2d at 562, we said that

> "[i]n ruling upon the presence of a genuine issue of fact as to the existence of actual malice the trial judge must decide whether:
>
> " '[T]he plaintiff has offered evidence of a *sufficient quantum to establish a prima facie case*, and the offered evidence *can be equated with the standard or test of "convincing clarity"* prescribed by United States Supreme Court decisions * * *.' *Chase v. Daily Record, Inc.*, 83 Wash.2d 37, 43, 515 P.2d 154, 157 (1973).
>
> "Accord, *United Medical Laboratories v. Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir.1968), cert. den. 394 U.S. 921, 89 S.Ct. 1197, 22 L.Ed.2d 454 (1969); *Buchanan v. Associated Press*, 398 F.Supp. 1196 (D.D.C.1975)."

See also *MacGuire v. Harriscope Broadcasting Co.*, supra, 612 P.2d at 832. The United States Supreme Court approved this approach to summary judgment in cases falling under the New York Times Company rule in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In *Anderson*, the Court explained that the requirement of clear and convincing evidence of actual malice was appropriate at the summary judgment stage because "the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary

standard of proof that would apply at the trial on the merits." 106 S.Ct. at 2512.

The trial court did not err in requiring appellants to provide clear and convincing evidence of malice in order to defeat appellees' summary judgment motion.

III. REFUSAL TO STRIKE

[3] Appellants next contend that the trial court erred in refusing to strike appellees' supplemental memorandum in support of their motion for summary judgment because it contained misleading, scandalous and impertinent material. They also contend that the court erred in not striking as untimely filed an appendix filed in support of the supplemental memorandum. We will not address these contentions at length because even if we assume that the trial court erred in denying appellants' motion to strike and we disregard the materials in the disputed documents, the outcome of this appeal would not be affected.

Appellees' initial memorandum and supporting documents, filed months before the summary judgment hearing, provided sufficient evidence to establish the absence of a genuine issue of material fact on the dispositive question of whether appellees acted with actual malice. Those materials demonstrated that appellees believed the contents of the Palacios letter because of telephone conversations in which Ms. Palacios apologized for conducting the investigation, her letter asking for assistance in finding an attorney, and the telegram describing the assignment. Our discussion here is confined to that portion of the letter in which Ms. Palacios quotes appellant Foley as stating "[d]ig up all the dirt you can find on this guy. Joe needs to get something on him . . . they're having some trouble with Sinclair." Ms. Palacios' statement that Foley said these words is clearly a statement of fact. The entire remainder of the letter either consists of factual assertions which are not defamatory or statements which are treated as nonactionable opinion in the labor dispute context.

> "[W]here potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." *Gregory v. McDonnell Douglas Corporation,* 17 Cal.3d 596, 131 Cal.Rptr. 641, 644, 552 P.2d 425, 428 (1976).

Appellees met their burden under Rule 56, W.R.C.P. even without the materials in the supplemental memorandum and appendix. Cf. *Hickey v. Burnett,* Wyo., 707 P.2d 741 (1985).

Simply stated, the trial court's refusal to strike appellees' supplemental memorandum and appendix did not rise to the level of prejudicial error.

IV. ATTORNEY-CLIENT PRIVILEGE

During the course of discovery, appellees continually asserted the attorney-client privilege in response to virtually all questions regarding communications made in the presence of attorney Daniel Gruender. These communications can be divided into two categories: (1) communications between Dorothy Palacios and Daniel Gruender; and (2) discussions among Daniel Gruender and Sinclair personnel, including appellees Holding and McIntire, concerning the decision to distribute the Palacios letter.

[4] With respect to the first category, appellants argue that Dorothy Palacios expressly waived the attorney-client privilege by the language contained in her letter to appellee Holding dated January 10, 1984. The attorney-client privilege is limited to

> "those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be

understood by the attorney as so intended. * * * Wherever the matters communicated to the attorney are intended by the client to be made public or revealed to third persons, obviously the element of confidentiality is wanting." E. Cleary, McCormick on Evidence, § 91 at 217 (3d Ed. 1984).

An exception to this rule arises when the same attorney represents two clients who share information on a matter of common interest:

> "When two or more persons, each having an interest in some problem, or situation, jointly consult an attorney, their confidential communications with the attorney, though known to each other, will of course be privileged in a controversy of either or both of the clients with the outside world, that is, with parties claiming adversely to both or either of those within the original charmed circle." McCormick, supra, at 219.

The classic example of this joint client exception occurs when two clients "walk into the lawyer's office together and retain him to represent both of them in the same matter." C. Wright and K. Graham, Federal Practice and Procedure: Evidence § 5505 at 556. Although this did not happen in the present case, Dorothy Palacios and appellees shared the same attorney, and a significant identity of interest existed between them. As stated by appellants in their brief, appellee Holding and Dorothy Palacios engaged in a "joint effort to fight the OCAWIU." We hold that the joint client exception applies under these circumstances. The district court did not err in ruling that the communications between Dorothy Palacios and Daniel Gruender were protected by the attorney-client privilege, nor did the ruling result in injustice or in the judgment entered being a sham.

[5] With respect to the second category of questions, those which relate to meetings held in the presence of Daniel Gruender in the days before the decertification election, ap-

pellants assert that the appellees waived the attorney-client privilege by raising malice as an affirmative defense and by asserting that the decision to publish the letter was made with advice of counsel.

Appellants have cited no authority to support the proposition that a libel defendant waives the attorney-client privilege by raising lack of malice as a defense. They argue, however, that "malice has been made an issue by the affirmative acts of the Appellees, as well as potentially by operation of law," and that in the interest of fairness all attorney-client communications which are relevant to the malice issue should be discoverable.

We find no merit in appellants' contention that malice became an issue as a result of appellees' "affirmative acts." When, as in this case, malice is an element of a libel action, the burden of pleading and proving that element rests on the plaintiff. R. Smolla, Law of Defamation, § 3.06 (1986). Consequently, malice became an issue in this case when appellants filed their complaint.

[6] We are also unpersuaded by appellants' argument that appellees waived the attorney-client privilege by stating during discovery that their decision to publish the Palacios letter was made with the advice and assistance of counsel. We recognize that reliance upon a defense of advice of counsel has, in some circumstances, been held to constitute a waiver of the attorney-client privilege. See, e.g., *United States v. Mierzwicki,* 500 F.Supp. 1331 (D.Md.1980). In this case, however, appellees did not rely on advice of counsel as a defense. They merely stated, in response to questions posed by appellants' counsel, that Daniel Gruender participated in the decision to publish the Palacios letter and helped prepare a cover letter for it. We reject appellants' assertions that these discovery responses amounted to a waiver of the privilege.

[7] Appellants next contend that the attorney-client privilege does not apply to many of the communications at

issue because they involved contemplated tortious acts. In *Hopkinson v. State,* Wyo., 664 P.2d 43, 66-67 (1983), we held that the privilege is inapplicable to communications made to further a crime or fraud. Although some jurisdictions have enlarged the crime or fraud exception to include contemplated torts, the wisdom of this expansion of the exception has been questioned.

> "Broadening the exception in such ways might lead, at least initially, to greater disclosure (more evidence with which to get at the truth), but in the long run surely the effect would be to discourage clients from attempting to conform their conduct to legal requirements and to discourage lawyers from seeking information from clients in order to advise them effectively * * *." 2 D. Louisell and C. Mueller, Federal evidence § 213 at 823-824.

We find this reasoning persuasive, and we decline to adopt an exception to the attorney-client privilege for contemplated tortious acts.

Finally, appellants assert that the trial court upheld the privilege in several situations in which appellants' discovery questions did not seek information concerning legal advice of an attorney while acting as an attorney. This assertion is unsupported by the record. All the questions in which the assertion of the attorney-client privilege was upheld required answers concerning communications made in the presence of Daniel Gruender while providing advice to his clients.

V. ISSUES OF MATERIAL FACT

Appellants contend that the trial court erred in granting summary judgment because significant issues of fact existed concerning the credibility of appellees Holding and McIntire. In support of this argument, appellants point to two purported inconsistencies. First, in their affidavits, appellees Holding and McIntire stated that their belief in the truth of

the contents of the Palacios letter was based upon information contained in a telegram from appellant Foley and a copy of Dorothy Palacios' report on her investigation, while in their answers to appellants' interrogatories they added additional factors they relied upon. Second, appellees Holding and McIntire stated in their affidavits that the decision to publish the letter was made by themselves while their answers to interrogatories indicate that they consulted with Daniel Gruender before making the decision.

This court has noted that summary judgment may not be proper when an action involves issues concerning state of mind and credibility. *Bryant v. Hornbuckle,* Wyo., 728 P.2d 1132 (1986). We have also stated that "[i]f the evidence presented * * * does not raise sufficient doubt of an affiant's credibility, a party's desire to test his statements by a jury will not preclude summary judgment." Id. at 1137.

The United States Supreme Court addressed this issue as it relates to libel cases in *Anderson v. Liberty Lobby, Inc.,* supra, in which the Court made the following observations:

> "Respondents argue * * * that whatever may be true of the applicability of the 'clear and convincing' standard at the summary judgment or directed verdict stage, the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), for this proposition. We do not understand *Poller,* however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of * * * legal malice. The

> movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." Id., 106 S.Ct. at 2514.

We conclude that purported inconsistencies in appellees' testimony did not create a genuine issue of material fact.

[8] Appellants assert that apart from the purported credibility issues, other issues of fact exist on the question of actual malice. While they contend that the evidence demonstrates several factors to support a finding of actual malice, in our view the only evidence which might arguably support such a finding is appellees' knowledge that Dorothy Palacios, the author of the letter, was biased against the union. Appellees' knowledge of her ill will toward appellants, however, does not by itself prove knowledge of probable falsity of the alleged defamatory statement, *Hotchner v. Castillo-Puche,* 551 F.2d 910, 913-914 (2nd Cir.1977); see also *Loeb v. New Times Communications Corp.,* 497 F.Supp. 85, 92-93 (S.D.N.Y. 1980), nor does it impose on appellees "an additional burden of extensive independent investigation." *Loeb v. New Times Communications Corp.,* supra, n. 12. The district court did not err in concluding that no genuine issue of material fact existed on the question of whether appellees acted with actual malice.

VI. INADMISSIBLE TESTIMONY

Finally, appellants assert that the trial court erroneously relied upon inadmissible testimony in entering summary judgment for appellees. Specifically, appellants assert that the following deposition testimony was inadmissible on the grounds of foundation and competency:

> "Q: 'Now is there any specific act of malice or recklessness or wanton conduct that you think were [sic]

> committed by Sinclair or by Mr. Holding or Mr. McIntire other than circulation of the two letters?
> [Objection omitted.]
> "A: 'I know of no other action that attaches to me personally, no . . .' "

Relying on this testimony, the trial judge stated in his opinion letter that he found it "dispositive" that "both plaintiffs Foley and Misbrener acknowledged that neither knew of any act or statement on the part of Sinclair, Holding, or McIntire which would indicate malice or recklessness on the part of defendants, other than circulation of the Palacios letter." Appellants correctly point out that there is nothing in the record to indicate that Foley and Misbrener knew the meaning of the legal terms contained in the question quoted above. Accordingly, we do not find it dispositive that appellants admitted in their depositions that they were unaware of any evidence to support a finding of actual malice. The dispositive issue is whether any evidence in the record before us supports such a finding, applying the evidentiary standard of convincing clarity. The record is devoid of such evidence; and, as a result, we affirm the district court.

Affirmed.

URBIGKIT, Justice, dissenting.

The court here determines that granting defendant Sinclair's motion for summary judgment was proper because the Union, as plaintiff, did not show actual malice as a subjective criterium when focused on the state of mind of the defendant's decisionmakers in questioning whether affidavit and deposition evidence was sufficient to establish a triable issue of fact. However, the reason why the Union could not show malice is the crux of this case: the attorney-client privilege, and whether it was properly applied in denial of plaintiff's discovery. In rejection of that pre-motion hearing discovery, the majority finds no waiver of the privilege, and

relies on three theories: (1) the joint-client exception; (2) the raising of malice as an affirmative defense; and (3) the advice of counsel.

I dissent, and would find the malice evidence as hidden information to be discoverable because the data is necessary for review by the court in decision on defendant's summary-judgment motion. The proof necessary for the Union to respond to the motion was extrapolated to be undiscoverable under a collusive shield of attorney-client privilege, since the two parties, by agreement, happened to "coincidentally" employ the same attorney. Conversely to that immunization, I would apply a rule of necessity to determine privilege and discoverability.[1]

Admissibility at trial is not of proper present focus, since the litigation proceeded only to the summary-judgment level and is consequently to be reviewed against the backdrop of such criteria. Factually, Sinclair moved for a motion to dismiss or in the alternative for summary judgment, with supporting affidavits. At that point, the burden shifted, and it became incumbent on the Union as the respondent to show there were material issues of fact. In *Cordova v. Gosar,* Wyo., 719 P.2d 625, 636 (1986), this court cited *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation,* 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), and expressed the view that:

> " '* * * [w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical

1. To change the scenario and contemplate that the disillusioned author of a critical election-date attack in a labor conflict vote had been employer's agent, or even an investigator retained by the employer's law firm, and who, after jumping ship, was led in employment-contract dispute to be represented by the Union's lawyers—would even-handed justice still envelop a malice issue by insulation of privilege in favor of the Union, or would the happenings between the employee and his new-found lawyers be discoverable in the suit between the employer and the Union, whether founded in libel, slander or perhaps intentional interference with a contract?

> doubt as to the material facts. [Citations.] In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Fed.Rule Civ.Proc. 56(e) (emphasis added.)' "

The information of what occurred must be evaluated in the light of the facts surrounding the parties when this court examines the entire record, *Wyoming Insurance Department v. Sierra Life Insurance Co.*, Wyo., 599 P.2d 1360 (1979), and considers this record from the viewpoint favorable to the party opposing the motion, the respondent. *Greenwood v. Wierdsma*, Wyo.. 741 P.2d 1079 (1987); *DeHerrera v. Memorial Hospital of Carbon County*, Wyo., 590 P.2d 1342 (1979).

The crucial question in this case becomes: how can the Union develop *specific facts* showing that there is a genuine issue for trial and thus defend against the summary-judgment motion filed by the defendants in the defamation action? The very nature of this suit commands that malice in publication is intrinsically involved. Consequently, to respond to the motion, the Union tried to discover the character of the conduct that the defendants engaged in—the character of the conduct which was inherently involved in the preparation of the joint representation and activity with their common attorney who, by the defendants' own admission, participated in the decision to publish the letter. This discovery was subsequently denied on the basis of attorney-client or, more appropriately, "attorney-clients" privilege, which justifies the summary judgment after the Union was foreclosed from discovering the facts necessary to refute the summary-judgment motion. The theoretical validity of a limited privilege as enunciated by this court in *Greenwood v. Wierdsma*, supra, is justified even more by the factual parameters of this case.

By holding as they do, when the state of mind of the parties is at issue, the majority put their stamp of approval on the approach here taken that the subjective intent of the parties can be hidden by employing a common attorney and

using the attorney-client privilege. A defendant can subsequently move for summary judgment and thwart the nonmoving party from discovering the facts necessary to fight such a motion. The underlying facts are permitted to be concealed, with the spoils going to the party who secreted them. Such a practice I cannot condone. The persuasive philosophy on the comparable Shield Law privilege-discovery dispute as elucidating fundamental constitutional concerns in *Hatchard v. Westinghouse Broadcasting Co.*, Pa., 532 A.2d 346 (1987), affords precedential support for discovery in this case.

The majority correctly point out that malice is an element of the libel and thus the burden of pleading and proving that element rests on the plaintiff, and became an issue when the Union filed their complaint. However, the defendants, by affirmative acts, did place lack of malice in issue. The defendants in their answers to the amended complaint list 16 separate defenses, five of which directly refer to lack of malice on their part:

> "21. As a further and separate defense, Defendants allege that they, at no time bore any malice or ill will toward Plaintiffs or any of them, but acted in full belief of the truth and verity of the statements in the Palacios letter.
>
> * * * * * *
>
> "25. As a further and separate defense, Defendants allege that the matters complained of are privileged under the guarantees of the First and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 20 of the Constitution of the State of Wyoming because Plaintiffs are public figures and the subject publication was not made with any malice, or intent to harm the Plaintiffs.
>
> "26. As a further and separate defense, Defendants allege the matters complained of are privileged in that the subject publication involves matters of public

interest and was not made with any malice, or intent to harm the Plaintiff.

"27. As a further and separate defense, Defendants allege that the matters complained of are privileged in that any publication made by these Defendants to other persons was upon a subject in which both have an interest and was not made with any malice, or intent to harm the Plaintiffs.

"28. As a further and separate defense, Defendants allege that the statements complained of were published in the course of a labor dispute and as such are privileged and immune for a libel claim since they were not published with actual malice, nor with knowledge of their falsity nor with reckless disregard of whether they were true or false nor were the Plaintiffs injured thereby."

Recently, some courts have taken a more justice-interest view of the placing-at-issue waiver of the attorney-client privilege, by applying what has been labeled as the *Hearn* analysis. *Hearn v. Rhay,* 68 F.R.D. 574 (E.D.Wash.1975); *United States v. Exxon Corporation,* 94 F.R.D. 246 (D.D.C. 1981). See also *Developments in the Law, Privileged Communications,* 98 Harv.L. Rev. 1450, 1641 (1985). In *Hearn v. Rhay,* supra, the court applied a tri-part test to determine if the attorney-client privilege can be waived with respect to pleaded matters when defendants claimed they acted in good faith and without malice. The *Hearn* test includes three criteria for utilizing the placing-at-issue waiver: the privilege-holder must (1) assert the privilege through some affirmative act which puts the protected information at issue; (2) through this act the asserting party puts the information at issue and renders it relevant to the action; and (3) by applying the privilege the opposing party would be denied access to privileged matter that is vital to the opposing party's defense. *Hearn v. Rhay,* supra, 68 F.R.D. at 581. Additionally, the court in *United States v. Exxon Corporation,* supra, used the *Hearn* test to hold that

the oil company had waived its attorney-client privilege in an action to recoup overcharges in the sale of oil when Exxon raised the defense of good-faith reliance on the Department of Energy's representations. In *Exxon,* as in the instant case, the purpose of the discovery was to determine facts which required delving into the subjective intent of the parties, and, as well, the attorney-client privilege was used as a shield to this discovery.

> "* * * Thus, the only way to assess the validity of Exxon's affirmative defenses, voluntarily injected into this dispute, is to investigate attorney-client communications where Exxon's interpretation of various DOE policies and directives was established and where Exxon expressed its intentions regarding compliance with those policies and directives. There is no other reasonable way for plaintiff to explore Exxon's corporate state of mind, a consideration now central to this suit." *Exxon v. United States,* supra, 94 F.R.D. at 249.

The situation in the case at bar is especially suited to the Hearn analysis because at the heart of the *Hearn* court's decision was the manifest unfairness of permitting a party to both assert information through some affirmative act for his own benefit, and to deny his opponent access to the very evidence that might refute or allow defense of this information. *Hearn v. Rhay,* supra, 68 F.R.D. at 581. Similarly, the case at bar presents a scenario where such manifest injustice did occur from such a practice.

An application of this *Hearn* analysis does not necessarily open up a Pandora's box of everything becoming unprivileged.

> "The anticipatory waiver theory concerns itself solely with the decision, whether by plaintiff or defendant, to commit to a course of action that would require the disclosure of privileged material. A defendant

> who answers a complaint with a general denial has not committed himself to such a course, because he bears no initial burden of going forward with evidence. Pleading an affirmative defense, however, if the defense can be established *only* with privileged evidence, will waive the defendant's privilege. The critical choice being exercised by the pleader is not whether to sue or defend, but whether to do so with privileged evidence. The decision to use privileged evidence should create a waiver of the evidence so disclosed and of any other evidence with regard to the same subject matter." 98 Harv.L.Rev. at 1643.

Sinclair asserted through five separate defenses that it had no malice when it published the letter. Consequently, by asserting this view in its answer to the amended complaint rather than a general denial, under the *Hearn* analysis the attorney-client privilege was waived, and the material became discoverable.

Additionally, there is great injustice in permitting the defendants to collusively hide the information and in effect deprive a court of the information it needs to avoid improperly terminating the case by summary judgment. A litigant should be permitted to diligently pursue discovery for the court to have the necessary information to effectuate a valid summary-judgment disposition.

The rule of necessity should be utilized to develop and reveal the information through discovery needed for the initial review by a court in a summary judgment proceeding.

> "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams v. Florida,* 399 U.S. 78, 82, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).

Without this necessary information, the court is effectively presented with only one hand to examine, and the use of the

privilege under this joint representation arrangement results in summary-judgment disposition becoming hardly more than a sham.

Unsettled by review of the comprehensive briefing and detailed record, and without defined opinion about what trial results might be, it is my conclusion that at least as now presented, this activated and anguished litigation should not have been concluded by summary judgment. Consequently, I dissent.

(2)

No. 87-1936

IN THE

Supreme Court of the United States

October Term, 1987

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, JOHN E. FOLEY, and JOSEPH M. MISBRENER, *Petitioners,*

v.

SINCLAIR OIL CORPORATION, a Wyoming and Delaware corporation, EARL HOLDING, individually and as Director and Officer of Sinclair Oil Corporation, J.R. McINTIRE, individually and as Refinery Manager and employee of Sinclair Oil Corporation, and JOHN DOE(S), whether singular or plural, that individual or those individuals who participated in the republishing of the defamatory statement, *Respondents.*

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REPLY OF PETITIONERS TO RESPONDENTS' BRIEF IN OPPOSITION

The Petitioners, through their attorneys, hereby file their reply to the Brief of Respondents' in Opposition to Petition for Certiorari.

ARGUMENT

I. The Need for This Court to Review the Definition of Actual Malice Utilized in the Labor Dispute Defamation Context is Reenforced by Statements Made in Respondents' Opposition Brief.

As they did below, the Respondents demonstrate in their Brief in Opposition the extreme negative feelings they harbor toward the

Petitioner, Oil, Chemical and Atomic Workers International Union ("OCAW" or "International Union") and labor organizations, in general. In Footnote 1 of the Respondents' Opposition Brief, found on pages 4 and 5, the Respondents describe their "past sad experiences with OCAW" and proceed to itemize, as they did to the courts below, a laundry list of incidents which the Respondents rely upon, at least in part, to support their belief in statements made in Dorothy Palacios' letter. As discussed below, a disputed issue of fact exists as to each and every item on the laundry list.

The Respondents have demonstrated to this Court the very point which Petitioners desire to advance and wish the Court to review. The Respondents' list of "past sad experiences with OCAW" demonstrates that they believed Palacios' letter, including the defamatory statements concerning her employment relationship with the International Union, regardless of the fact that the Respondents, as stated in deposition testimony, knew nothing about how she was treated as an employee and were well aware that she was a recently terminated, disgruntled employee with every reason to make false statements. To require the Petitioner to prove that the Respondents had a high degree of awareness of probable falsity is to place a severe burden on the Petitioners in proving their case. The Respondents demonstrate their extreme prejudice in Footnote 1, such that they likely would believe nearly any false statement about the OCAW. The standard used by the lower courts, therefore, proves to be an insurmountable burden to Petitioners and similarly situated plaintiffs.

The issue is compounded by the fact that the alleged actions set forth in Footnote 1 of the Respondents' Brief concern incidents occuring in Rawlins, Wyoming at the local union level. The officers of the International Union and the International Union, itself, were not connected with the actions itemized. Palacios' defamatory statements, however, concern International Officers and the International Union and its treatment of her as an employee. This Court has affirmed the principle that an international union is not liable for the acts of a local affiliated union absent clear involvement by the international union or ratification of the local union's action by the interntional union. *Carbon Fuel Co. v. United Mine Workers of America,* 444 U.S. 212 (1979); *Coronado Coal Co. v. United Mine Workers of America,* 259 U.S. 344 (1925).

A jury could certainly find publication on the part of the Respondents with actual malice, specifically publication with reckless disregard of the truth of the matter asserted, when presented with the fact that the primary reason the Respondents believed the letter was true surrounded matters involving only local incidents not directly connected to the defamed parties. Coupled with the fact that the individual Respondents admitted to knowing nothing about how the International Union treated its employees, this Court should grant the Writ to rectify this error.

Finally, with respect to each alleged incident described in Footnote 1, and otherwise mentioned by the Respondents in the courts below, the Petitioners have presented documents and other evidence which dispute Petitioners' involvement in any way in these incidents and even dispute that these incidents occurred as alleged. Therefore, the lower courts errored in granting a summary judgment given the genuine issues of material fact with respect to the issue of Respondents belief that the letter was true, when that belief was based upon facts completely in dispute. Petitioners have thus been denied their Constitutional right to access to courts affirmed by this Court.

II. The Respondents Misinterpret This Court's Decision in *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966).

The Respondents, at page 9 of their Opposition Brief, assert that this Court's decision in *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966), "confirmed earlier holdings of various lower court and established an unassailable precedent for the principle that unions and union officials engaged in labor disputes are public figures, that such cases involve matters of public interest or general concern, and are subject to the standards enunciated in *New York Times Co. v. Sullivan, supra.*" (Citations omitted).

The Respondents do not understand this Court's reasoning in applying the actual malice standard by analogy, rather than constitutional compulsion, to defamation actions arising out of a labor dispute. This Court in *Linn did not* establish the principle that unions and union officials engaged in labor disputes are

public figures. The decision also *did not* establish the principle that labor dispute defamation cases are cases involving matters of public interest or general concern. Indeed, Petitioners are arguing to this Court that the standard to be applied in a labor dispute context is different than the standard applied in cases involving public figures and matters of public interest or general concern. The Court has not defined reckless disregard in the context of a labor dispute, republication matter. Therefore, it is appropriate for the Writ to be granted.

III. The Respondents Inaccurately State to This Court That the Wyoming Supreme Court Dealt With Each of Petitioners' Claims That the Attorney-Client Privilege was Improperly Applied by the Trial Court.

At page 13 of their Opposition Brief, the Respondents assert that the Wyoming Supreme Court "dealt in depth with each of the Petitioners' claims that the attorney/client privilege was improperly implied by the Trial Court." As the Petitioners state in their Petition for a Writ of Certiorari, the trial court and Wyoming Supreme Court did, indeed, discuss several of the arguments advanced by the Petitioners concerning the attorney/client privilege. However, only dissenting Justice Urbigkit discussed the most important argument advanced, that being the argument of necessity.

Since the trial court and Wyoming Supreme Court were insisting that the Petitioners present evidence of publication with subjective awareness of probable falsity on the part of the Respondents in republishing the defamatory letter, it was absolutely necessary that the Petitioners be allowed to delve into the minds of the Respondents and Sinclair's agents regarding the critical decision of whether to publish the letter. Since attorney Daniel Gruender was intimately involved in every step of the critical decision, a factor which the Respondents failed to even mention in their Brief in Opposition, the rule of necessity requiring complete discovery should have been utilized by the Courts below to overcome any privilege found to be applicable. *Trammel v. United States*, 445 U.S. 40 (1980). The argument of necessity, in any

event, was not discussed by the courts below. Thus, the Respondents are incorrect in stating that the lower courts dealt with all of the Petitioners' arguments.

IV. Contrary to the Position Taken by the Respondents, the Question of Whether a Defamatory Statement is Fact or Protected Opinion is not Generally a Question of Law But, Rather, a Question of Fact to be Determined by the Jury.

In their Brief of Opposition, the Respondents make the assertion that the determination of whether a potentially defamatory publication is protected opinion or a statement of fact is a question of law to be determined by the court, citing *Gregory v. McDonnell Douglas Corporation*, 552 P.2d 425 (Cal. 1976). The Respondents failed to point out however, that that portion of the *Gregory* decision dealing with the opinion versus fact issue had been subsequently modified by the California Supreme Court in *Slaughter v. Freedman*, 649 P.2d 886 (Cal. 1982). In *Slaughter*, the California Supreme Court holds that, unless a statement is unambiguously a statement of opinion, the matter must be submitted to the trier of fact for determination. Also, the Respondents failed to point out that virtually every court dealing with the issue of whether the opinion versus fact question should be submitted to the jury, has ruled that the matter should be submitted to the jury unless the matter is unambiguously a statement of opinion.[1]

The Petitioners would urge this Court to correct the trial court's usurpation of the duties of the trier of fact in this matter. The letter constituted a statement of fact and consisted at least in part of defamatory factual statements particularly when the very authoress begins her letter with the words "there are some facts you should know." Also, affidavit evidence was submitted to the

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[1] *See, Caron v. Bangor Publishing Company*, 470 A.2d 782 (Me. 1984); *Lyons v. New Mass Media, Inc.*, 453 N.E.2d 451 (Mass. 1983); *Griffin v. Opinion Publishing Company*, 138 P.2d 580 (Mont. 1943); *Nevada Independent Broadcasting Corp. v. Allen*, 664 P.2d 337 (Nev. 1983); *Pease v. Telegraph Publishing Company, Inc.*, 426 A.2d 463 (N.H. 1981); and *Marchiondo v. Brown*, 649 P.2d 462 (N.M. 1982).

lower courts from individuals who actually received the letter the day it was distributed to Sinclair employees who believed when they read it that the letter contained statements of fact. Summary judgment was improper in this case inasmuch as the lower courts improperly applied this Court's "protected opinion" theory.

Respectfully submitted,

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